No. 15365

United States
Court of Appeals
for the Ninth Circuit

SHELL OIL COMPANY, a Corporation,

Appellant,

vs.

LANUS WAYNE PRESTIDGE,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Idaho
Eastern Division

FILED
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PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-22-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Appellant.

GLENN A. COUGHLAN,
327 Idaho Building,
Boise, Idaho;

Attorney for Appellee.

In the District Court of the United States, in and for the District of Idaho, Eastern Division

No. 1876

LANUS WAYNE PRESTIDGE,

Plaintiff,

vs.

SHELL OIL COMPANY, a Corporation, ROCKY MOUNTAIN OIL CORPORATION, a Corporation, and STONY POINT DEVELOPMENT, INC., a Corporation,

Defendants.

COMPLAINT

Plaintiff complains of the defendants and for cause of action alleges:

I.

That plaintiff is a resident of the State of Idaho.

II.

That the defendant Shell Oil Company is a corporation incorporated under the laws of the State of Delaware and is authorized and licensed and qualified to do business in the State of Idaho.

III.

Defendant Rocky Mountain Oil Corporation is a Colorado Corporation doing business within the State of Idaho without authorization and without the appointment of a statutory agent as required by law.

IV.

The Stony Point Development Company, Inc., is a Colorado Corporation which operates within the State of Idaho without authorization and without the appointment of a statutory agent as required by law.

V.

The matter in controversy herein exceeds, exclusive of interest and costs, the sum of $3,000.00.

VI.

That on or about the 2nd day of June, 1954, the defendants were engaged in oil well drilling operations approximately fifteen miles northwest of the City of Montpelier, Idaho.

VII.

That on the 2nd day of June, 1954, plaintiff was upon the defendants' premises at their invitation when they negligently, carelessly and recklessly poured oil upon an open fire, causing an explosion.

VIII.

That at the time and place above described as a direct proximate result of the said explosion, plaintiff was severely burned about his face and about his body, causing him painful and permanent injuries and disfigurement and requiring extensive and prolonged hospitalization and specialized medical care.

IX.

That ever since the injuries aforesaid, plaintiff has been unable to do or perform his usual manual labor and has thereby suffered loss of earnings, has become liable for hospital, medical care, treatment and sup-

plies in the sum of $1,800.00. Plaintiff has further suffered severe mental and physical pain and anguish and disfigurement and will in the future continue to suffer as a result of the permanent and serious nature of his injuries aforesaid.

Wherefore, plaintiff demands damages against the defendants as follows:

1. For special damages the sum of $1,800.00.
2. For general damages the sum of $100,000.00.
3. For costs and expenses incurred in this action.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

Plaintiff demands that the above-entitled cause be tried before a jury.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

[Endorsed]: Filed January 6, 1955.

[Title of District Court and Cause.]

No. 1876

MOTION TO DISMISS

The defendant Stony Point Development, Inc., a Corporation, moves the Court as follows:

I.

To dismiss this action against it because the complaint fails to state a claim against said defendant upon which relief can be granted.

II.

That nowhere in plaintiff's complaint is there any allegation of joint enterprise or mutuality of interest of the said three defendants.

III.

That nowhere in plaintiff's complaint is there any allegation as to which of said three defendants employed the agent who committed the alleged acts of negligence set forth in plaintiff's complaint.

IV.

That nowhere in plaintiff's complaint is there any allegation by which can be determined plaintiff's damages, if any, in this: That said complaint does not state facts from which can be determined plaintiff's past actual earnings, his potential probable future earnings capacity, nor his trade, occupation or industry by which can be determined his actual earning capacity.

/s/ G. STANDACHER,
Attorney for Defendant Stony
Point Development, Inc.

[Endorsed]: Filed January 31, 1955.

[Title of District Court and Cause.]

Civil No. 1876

MOTION FOR MORE DEFINITE STATEMENT

Shell Oil Company, one of the defendants above named, appearing for itself only and not for any other party named herein, moves this court for an order requiring a more definite statement from the plaintiff as to the following matters contained in the complaint filed herein:

(a) For a complete statement showing which of the above-named defendants were engaged in the oil well drilling operations described in VI of said complaint.

(b) A complete statement showing what person or persons poured oil upon the open fire described in VII of the complaint and a complete statement showing the relationship of such person or persons to the defendants above named and especially to this defendant.

Wherefore, This defendant asks that the above motion be heard and determined before it is required to plead further.

HAWLEY & MARCUS,

By /s/ CLAUDE MARCUS,

Attorneys for Defendant Shell Oil Company, a Corporation.

Service of Copy acknowledged.

[Endorsed]: Filed February 7, 1955.

[Title of District Court and Cause.]

File No. 1876

STIPULATION

Comes now, Glenn A. Coughlan, Attorney for the Plaintiff, and Claude Marcus, Attorney for the Defendant Shell Oil Company, and stipulate as follows:

That the Motion for More Definite Statement filed by the defendant Shell Oil Company in the above-entitled matter may be submitted to the Court at Boise, Idaho, at 10.00 a.m. March 14, 1955, or as soon thereafter as the same can be heard.

Dated this 21st day of February, 1955.

GLENN A. COUGHLAN,
Attorney for Plaintiff.

/s/ CLAUDE MARCUS,
Attorney for Defendant Shell Oil Company, a Corporation.

[Endorsed]: Filed March 2, 1955.

[Title of District Court and Cause.]

No. 1876-E, Civil

MINUTES OF THE COURT

March 15, 1955

This cause came on regularly this date in open court on plaintiff's Motion for Production of Docu-

ments and defendant's Motion for More Definite Statement, Glenn Coughlan appearing on behalf of the plaintiff and Claude Marcus appearing on behalf of the defendant.

After hearing counsel the Motion for Production of Documents was granted and defendant given 15 days to produce. The Motion for a More Definite Statement was denied and counsel were ordered to proceed by Interrogatories and the defendant was given 45 days to answer.

[Title of District Court and Cause.]

File No. 1876

ANSWER OF SHELL OIL COMPANY

The Shell Oil Company, a Corporation, one of the defendants above named, answers the complaint herein as follows:

First

Unless specifically admitted, this defendant denies each and every allegation contained in said complaint.

Second

This defendant replies to the separate paragraphs of said complaint as follows: Denies each and every allegation contained in paragraphs I, V and VII. Admits the allegations contained in paragraph II. Replying to paragraphs III and IV, this defendant does not have information upon which to form a

belief with respect to paragraphs III and IV and therefore deny the same. Replying to paragraph VI, this defendant admits that certain oil well drilling operations were being conducted on or about the 2nd of June, 1954, by one or both of the other defendants hereinabove named, but specifically denies that this defendant was engaged in such operations. Replying to paragraph VIII this defendant admits that said plaintiff was burned to some extent on or about said date, the extent of which is not known to this defendant, but alleges that such injuries were suffered by the plaintiff as a result of his own negligence and carelessness. Replying to paragraph IX, admits that said plaintiff incurred some expense in connection with his care and treatment, the amount of which is not known to this defendant and denies each and every other allegation therein contained.

Third

Further answering said complaint, this defendant alleges that it was not engaged in the oil well drilling operations described in said complaint; in no way controlled such operations; that the plaintiff was not injured on said premises by this defendant, and that this defendant in no way caused any injuries or damages which the plaintiff might have suffered.

Fourth

This defendant alleges that any injury which was sustained or suffered by plaintiff at the time and place and on the occasion mentioned in the com-

plaint was caused in whole or in part, or were contributed to by the negligence or fault or want of care of the plaintiff and not of any negligence on the part of this defendant.

Wherefore, This defendant respectfully prays that plaintiff take nothing under his complaint and that this defendant be given costs incurred herein.

HAWLEY & MARCUS,

By /s/ CLAUDE MARCUS,
Attorneys for Shell Oil Company, a Corporation.

Service of Copy acknowledged.

[Endorsed]: Filed March 20, 1955.

[Title of District Court and Cause.]

No. 1876

ANSWER

Comes Now Defendant Rocky Mountain Oil Corporation and hereby withdraws its Motion to Dismiss heretofore filed herein, and for Answer to plaintiff's Complaint herein admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraphs I, V and VI of plaintiff's complaint.

II.

Denies each and every other allegation contained in plaintiff's complaint on file herein not hereinafter specifically admitted.

Wherefore, defendant prays that plaintiff take nothing under his complaint filed herein and that defendant be awarded his costs incurred.

Dated this 2nd day of September, 1955.

ROCKY MOUNTAIN OIL CORPORATION;

By /s/ J. J. McINTYRE,
President.

Receipt of copy acknowledged.

[Endorsed]: Filed September 6, 1955.

[Title of District Court and Cause.]

No. 1876

STIPULATION AND ORDER

Comes now Glenn A. Coughlan, Attorney for plaintiff, and E. W. Windolph, President of defendant Stony Point Development, Inc., a corporation, and hereby stipulate as follows:

That the defendant Stony Point Development, Inc., a corporation, may be dismissed as a party defendant in the above-entitled action, each party to bear its own costs.

Dated this 2nd day of September, 1955.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

/s/ E. W. WINDOLPH,
President of Stony Point Development, Inc., Defendant.

Order

The parties hereto having filed Stipulation for Dismissal of Stony Point Development, Inc., a corporation, and the Court being advised in the premises:

It Is Hereby Ordered that Stony Point Development, Inc., be, and the same is hereby, dismissed as a party in the above-entitled matter.

Dated this 7th day of September, 1955.

/s/ CHASE A. CLARK,
U. S. District Judge.

[Endorsed]: Filed September 7, 1955.

[Title of District Court and Cause.]

File No. 1876

INTERROGATORIES BY PLAINTIFF

To the Above-Named Defendant, Shell Oil Company:

You are hereby notified to answer under oath the interrogatories numbered 1 to 50 as shown below

within 15 days of the time of service is made upon you, in accordance with Rule 33 of Federal Rules of Civil Procedure.

1. Furnish true copy of U. S. Oil & Gas Lease Idaho 045 between you and Federal Bureau of Land Management.

2. Furnish true copy of Agreement dated the 26th day of December, 1952, and exhibits attached thereto, between you and Wheeler and Gray pertaining to Lot 2, Section 30, Tp. 12, SR 46 EBM.

3. Furnish true copy of Assignment from Wheeler and Gray to Rocky Mountain Oil Corporation executed March 6, 1953.

4. Furnish true copy of consent by you to the Assignment referred to in Interrogatory No. 3 executed August 7, 1953, by S. F. Bowlby.

5. Furnish true copy of Partial Assignment of Oil & Gas Lease between you and Rocky Mountain Oil Corporation executed July 15, 1953, pertaining to Lot 2, Section 30, Tp. 12, SR 46 EBM.

6. Furnish true copy of confirmation and assignment as to above Agreements and property dated on or about June 11, 1954, between you and Rocky Mountain Oil Corporation.

7. Did you do geological and title work on lands in connection with U. S. Oil & Gas Lease Idaho 045, and was the expense in connection therewith paid by you?

8. Was geological data and title data furnished by you to Rocky Mountain Oil Corporation concerning U. S. Oil and Gas Lease Idaho 045?

9. Did you on June 2, 1954, own leases to properties adjacent to Lot 2, Section 30, Tp. 12, SR 46 EBM, upon which the oil well was drilled by Rocky Mountain Oil Corporation?

10. Please attach plat showing location of land assigned to Rocky Mountain Oil Corporation under partial assignment of lease and adjacent properties held by you.

11. Did you require that the drilling of the oil well commence prior to June 26, 1953?

12. Did you fix the location of the well?

13. Did you require the well to be drilled to a certain depth?

14. (a) Was there a time limit with which the well was to be drilled?
(b) What was that?

15. (a) Did you grant extensions of time for completion of drilling the well to Rocky Mountain Oil Corporation?
(b) If so, how many?
(c) When were they given?

16. (a) Please state the names of your officials, employees or representatives on the premises at the oil well during the drilling operation by Rocky Mountain Oil Corporation.

(b) State their duties and how long they remained upon the premises.

(c) Did your geologist take daily samples during the drilling by Rocky Mountain Oil Corporation?

17. Was this well drilled in order to give you a test for the adjacent properties held by you?

18. Does Rocky Mountain Oil Corporation owe you for rentals paid by you on their behalf on lands covered by U. S. Oil & Gas Lease Idaho 045?

19. Was Rocky Mountain Oil Corporation required to make tests on the well and satisfactory to you upon your request?

20. Were you, under your Agreement with Rocky Mountain Oil Corporation, to have full access to the well and records concerning the drilling of the well?

21. Was a requirement of yours that in the event oil or gas showed during the drilling by Rocky Mountain Oil Corporation they were to cease drilling?

22. Was it your requirement and agreement with Rocky Mountain Oil Corporation that your representatives were to be present at the testing of the well?

23. Was Rocky Mountain Oil Corporation to furnish you drill cuttings at 10-foot intervals from 2500 feet on?

24. Was Rocky Mountain Oil Corporation to furnish you with all drilling information samples

and a day-to-day daily drilling report during the drilling of the well?

25. Was Rocky Mountain Oil Corporation required to furnish you with a certified copy of the complete log upon the completion of the well?

26. Was it not a requirement that prior to the plugging of the well and after its completion, a representative of yours was to determine if the proper depth was reached?

27. Did you have a right to request steel line measurements to be made in the presence of your representatives, said steel line measurement to be made by Rocky Mountain Oil Corporation?

28. Was Rocky Mountain Oil Corporation to furnish you with a Schlumberger Log?

29. Was it not an agreement that the well could not be plugged until 24 hours after the delivery of the Schlumberger Log to you?

30. Was not Rocky Mountain Oil Corporation to make tests of showings if you so requested?

31. Was it not the agreement between you and Rocky Mountain Oil Corporation that there were to be no liens permitted upon the well or premises which would jeopardize your over-riding royalty?

32. Was it not a further agreement that there could be no abandonment of the oil well without 15 days' notice to you?

33. Was not Shell Oil Company to have the right to make tests at its own expense within the 15-day period prior to an abandonment?

34. Could not Shell Oil elect to take over the well and have the premises reassigned to it free and clear of all encumbrances in the event of an abandonment?

35. What was the agreement in the event that Shell Oil Company should take over the well with respect to reimbursing Rocky Mountain Oil Corporation for salvage value and other costs?

36. Please state to what extent you would share in the losses of the venture in the event oil was not obtained.

37. How much per foot were you to pay toward the cost of the well in the event of a dry hole?

38. What consideration was to be paid to Rocky Mountain Oil Corporation by you in the way of assignment of acreage for drilling this well?

39. Who was to pay the rentals on this acreage?

(a) Did you pay rentals on this?

(b) Does Rocky Mountain Oil Corporation owe you now for the rentals?

40. Please state to what extent Shell Oil Company would participate in the profits in the event the drilling turned out to be a producing well.

41. Was not Shell Oil Company frequently consulted in connection with the drilling of this oil well?

42. If the well were a producer, then was Rocky Mountain Oil Corporation required to drill three more wells within not more than three months' time interval between the drilling of wells?

43. Was it not true that the Lease Agreement or any of the production of the well could not be assigned first without the consent of Shell Oil Company?

44. Were you not entitled to take all the production of the well should you so desire?

45. Was it not the agreement that the lease under which Rocky Mountain Oil Corporation operated could not be surrendered without first offering it to Shell Oil Company?

46. Was it not a requirement that in the event an assignment was made by Rocky Mountain Oil Corporation it was to be subject to the agreement between Rocky Mountain Oil Corporation and Shell Oil Company?

47. Was it not the agreement that in any event an assignment could not be made for financing by Rocky Mountain Oil Corporation until the well was completely drilled?

48. Were not the operations being carried out on June 2, 1954, at the well site pursuant to your agreements previously made with Rocky Mountain Oil Corporation?

49. On June 2, 1954, did you not have other agreements and arrangements with Rocky Moun-

tain Oil Corporation for the drilling of wells in Wyoming, Utah and other states?

50. Did you subsequent to June 2, 1954, pay the dry hole money provided for in the Contract in connection with the drilling of this well?

Dated this 12th day of September, 1955.

GLENN A. COUGHLAN,
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 12, 1955.

[Title of District Court and Cause.]

No. 1876

ANSWER TO INTERROGATORIES BY DEFENDANT ROCKY MOUNTAIN OIL CORPORATION

To Glenn A. Coughlan, Attorney for the Plaintiff:

The following are answers of the defendant Rocky Mountain Oil Corporation to the Interrogatories numbers 1 through 15, directed to the defendant Rocky Mountain Oil Corporation to be answered pursuant to Rule 33:

Answer to Interrogatory No. 1:

The lease as to Lot 2, Section 30, Township 12 South, Range 46 East, was in the name of Rocky

Mountain Oil Corporation; the other leases were in the name of Shell Oil Company.

Answer to Interrogatory No. 2:

The agreement is set out in the instruments attached pursuant to Interrogatory numbered 5.

Answer to Interrogatory No. 3:

Those things proveded for in the contract attached pursuant to Interrogatory numbered 5.

Answer to Interrogatory No. 4:

The money provided for in the contract, being dry hole money at the rate of $1.50 per foot for the first 3,500 feet and $2.00 per foot for the next 1,500 feet, not to exceed $8,250.00 in any case.

Answer to Interrogatory No. 5:

Attached are copies of an Agreement dated December 26, 1952, between Wheeler and Gray and Shell Oil Company; an Assignment wherein Wheeler and Gray assigned their interest to Rocky Mountain Oil Corporation; and a Consent whereby Shell Oil Company consented to such Assignment.

Answer to Interrogatory No. 6:

A geologist from the office of Shell Oil Company was present part of the time. I have no knowledge of any other supervisors, officials or employees of Shell Oil Company being present.

Answer to Interrogatory No. 7:

As far as I know, said geologist was present to observe.

Answer to Interrogatory No. 8:

Extensions of time for commencement were obtained from them. During drilling they were informed with respect to the drilling progress and formations encountered.

Answer to Interrogatory No. 9:

No. Rental payments were handled in accordance with the contract. Most of the rentals were paid by Shell Oil Company and a charge made against Rocky Mountain Oil Corporation for its pro-rata share. Rocky Mountain had paid the last rental upon the land where the well was drilled.

Answer to Interrogatory No. 10:

Reports were made substantially in accordance with the contract for the purpose of keeping Shell Oil Company informed.

Answer to Interrogatory No. 11:

The contract gave them that right, as I understood the contract, with respect to producing horizons. We were not to earn our acreage until we had drilled the well in accordance with the requirements of the contract, and this was one of the conditions precedent to the earning of such acreage.

Answer to Interrogatory No. 12:

The contract will speak for itself. However, I interpret it to call for consent in case of an assignment of the Agreement itself, but after the earning of acreage and the receipt of assignments therefor, no consent is required to effect a transfer, in my opinion.

Answer to Interrogatory No. 13:

Only to the extent of the dry hole money provided for in the contract and referred to in the Answer to Interrogatory numbered 4.

Answer to Interrogatory No. 14:

The contract speaks for itself. Shell Oil Company was retaining a certain sliding scale overriding royalty in the Lot drilled upon and in an additional 120 acres. They had no other participation in the profits, but they did have additional acreage which could be proved or disproved by the well.

Answer to Interrogatory No. 15:

Yes. We paid the rental and renewed the lease on Lot 2 of Section 30. The rest was handled as provided for in the contract.

Duly verified.

(Copy)

Assignment

Whereas, Wheeler and Gray, a partnership consisting of Bert Wheeler and Lloyd Gray, have entered into a certain agreement dated December 26, 1952, with Shell Oil Company, a Delaware corporation, under which said partnership agreed to drill or cause to be drilled a test well for oil and gas upon Lot 2 of Section 30, Township 12 South, Range 46 East, Boise Meridian, Idaho, in consideration for which Shell Oil Company agreed to assign to said partnership certain oil and gas leases covering approximately 2600 acres, said acreage being checkerboarded with Shell Oil Company and being on what is considered to be the Give Out Structure, in Township 12 South, Ranges 45 and 46 East, Bear Creek County, Idaho, subject to an outstanding overriding royalty of one-half of 1 percent held by Ragner Barhaugh of Casper, Wyoming, and an additional sliding scale overriding royalty to be retained by Shell Oil Company upon the 160 acres where said well is drilled, and also to contribute $8,000.00 towards the cost of said well in the event of a dry hole.

Whereas, said partnership has agreed to assign all rights under said agreement to Rocky Mountain Oil Corporation, a Colorado corporation, and said corporation has agreed to fulfill all obligations under said agreement.

Now, Therefore, for and in consideration of $1.00 and other valuable considerations, receipt of which

is hereby acknowledged, the aforesaid partnership does hereby sell, assign, transfer and convey unto said Rocky Mountain Oil Corporation, all rights and all of its title and interest in, to and under the aforesaid agreement, and assignee by accepting this assignment hereby agrees to be bound by said agreement, to perform all of the covenants therein contained and to fulfill all of the drilling requirements and other obligations of said agreement, in accordance with the provisions of such agreement.

In Witness Whereof, this instrument is executed in duplicate this 6th day of March, 1953.

WHEELER AND GRAY,

By BERT WHEELER,

By LLOYD GRAY.

Accepted and Agreed:

ROCKY MOUNTAIN OIL CORPORATION.

By LLOYD G. GRAY,
Vice-President;

By JOHN J. McINTYRE,
Secretary.

Duly verified.

(Copy)

Consent

Pursuant to Section 10 of that certain Agreement dated December 26, 1952, by and between Shell Oil

Company, a Delaware corporation, and Wheeler and Gray, a partnership consisting of Bert Wheeler and Lloyd G. Gray, Shell hereby consents to the attached assignment dated March 6, 1953, from Wheeler and Gray to Rocky Mountain Oil Corporation, a Colorado corporation, which expressly assumed all the duties and obligations of Wheeler and Gray as set forth in said agreement. This consent, however, shall not operate or be construed as a waiver with respect to any other or subsequent assignments or transfers.

SHELL OIL COMPANY,

By S. F. BOWLBY,
Vice-President;

By .....,
Assistant Secretary.

Duly verified.

[Endorsed]: Filed September 21, 1955.

[Title of District Court and Cause.]

No. 1876-E—Civil

MINUTES OF THE COURT

OCTOBER 5, 1955

This cause came on for trial before the Court and a jury. Glenn A. Coughlan appearing for plaintiff, and Claude Marcus and Gus Carr Anderson for Shell Oil Company, and J. J. McIntyre for the Rocky Mountain Oil Corporation.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper, to secure a jury. Charles E. Cope, whose name was so drawn, was excused on plaintiff's peremptory challenge; Mrs. Esther Bischoff, Mrs. Kate Rainey, Mrs. Owen Benzon and Mrs. Irene Reed, whose names were likewise drawn, were excused on the defendants' peremptory challenges.

The following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified and who were accepted by the parties to complete the panel of the jury, to wit:

1. Mrs. Ray L. Haddock
2. Fergus Briggs, Jr.
3. Clarence E. Hensley
4. Millie Mortensen
5. Otto Barthold
6. Hyrum Cooper
7. Elmo Jensen
8. William Jones
9. Marguerita Christensen
10. Louise Farmer
11. L. C. Darrah
12. Vance Bigler

The Court directed that one juror, in addition to the panel, be called to sit as an alternate juror. Thereupon, the name of Jack W. Mays was drawn from the jury box, and on being sworn and ex-

amined on voir dire, was found duly qualified, and was accepted by counsel for the respective parties.

The jury panel and the alternate juror were sworn to well and truly try the cause at issue and a true verdict render.

After a statement of plaintiff's cause by his counsel, Lanus Wayne Prestidge was sworn and examined as a witness in his own behalf and other evidence was introduced.

At this point it was ordered that the deposition of Rufus Doman be published. It was stipulated between counsel that the deposition of Rufus Doman used in case No. 1875 could also be used in this case.

Dr. R. B. Lindsay and J. J. McIntyre were sworn and examined as witnesses on the part of plaintiff.

It is stipulated between counsel that plaintiff's Exhibits Nos. 8 through 13 are true and exact copies of the originals. It is further stipulated that plaintiff's Exhibits No. 7 and No. 12 in case E-1875, William G. Wuthrick vs. Shell Oil Co., et al., may be used as plaintiff's Exhibits Nos. 8 and 15, respectively, in the present case.

Here plaintiff rests.

Comes now Claude Marcus, one of counsel for the Shell Oil Co., and moves the Court to dismiss this action as to the Shell Oil Company. The Motion is denied.

Here defendant Shell Oil Company rests and also defendant Rocky Mountain Oil Corporation rests.

After admonishing the jury, the Court excused them until 10 o'clock a.m. Thursday, October 6, 1955, and further trial of the cause was continued to that time.

[Title of District Court and Cause.]

REQUESTED INSTRUCTIONS BY DEFENDANT, SHELL OIL COMPANY

Now comes Shell Oil Company, one of the defendants in the above cause, and requests the court to give to the jury the following instructions:

Instruction No. 1

You are instructed, ladies and gentlemen of the jury, to find the verdict for the defendant, Shell Oil Company, upon the ground that it has not been proven that the Shell Oil Company was responsible in any way for the injury to the plaintiff in that it has not been shown that the Rocky Mountain Oil Corporation was an agent, servant or employee of the defendant, Shell Oil Company, and that therefore Shell Oil Company is not responsible for such acts of the Rocky Mountain Oil Corporation.

Instruction No. 2

The plaintiff has introduced in this case Exhibit No. . . ., which is called "Designation of Operator." You are instructed that this instrument was filed with the United States Land Department to comply with its regulation 221.19, and is not pertinent to

the issues involved in this case and you are directed to disregard it.

Instruction No. 3

You are instructed that as a matter of law that the evidence in this case does not show that the Rocky Mountain Oil Corporation was acting as the agent, servant or employee of the defendant, Shell Oil Company, at the time of this accident and therefore the Shell Oil Company is not liable in this case and you should not return a verdict in this case against the Shell Oil Company.

Instruction No. 4

You are instructed that should you find the Rocky Mountain Oil Corporation liable in this action but determine that this company was not the agent, servant or employee of the Shell Oil Company at the time of such accident then you should not render a verdict in this case against the Shell Oil Company.

Dated this 6th day of October, 1955.

HAWLEY & MARCUS,
Attorneys for Shell Oil Company;

By /s/ CLAUDE MARCUS.

[Endorsed]: Filed October 6, 1955.

[Title of District Court and Cause.]

No. 1876

VERDICT

We, the jury in the above-entitled cause, find for the Plaintiff, and against the defendants, Shell Oil Company and Rocky Mountain Oil Corporation, and assess damages against the defendants, Shell Oil Company and Rocky Mountain Oil Corporation, in the sum of $19,905.85.

/s/ VANCE BIGLER,
Foreman.

[Endorsed]: Filed October 6, 1955.

[Title of District Court and Cause.]

No. 1876-E—Civil

MINUTES OF THE COURT

OCTOBER 6, 1955

This cause came on for further trial before the Court and jury; counsel for the respective parties being present, it was agreed that the jury panel and the alternate juror were all present.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury.

The Court discharged the alternate juror, and the jury panel then retired in charge of a bailiff, duly sworn, to consideration of their verdict. While the jury was still out, the Marshal was directed to provide them with lunch at the expense of the United States.

On the same day the jury returned into court, counsel for the respective parties being present, whereupon, the jury presented their written verdict, which was in the words following:

We, the jury in the above-entitled cause, find for the Plaintiff, and against the defendants, Shell Oil Company and Rocky Mountain Oil Corporation, and assess damages against the defendants, Shell Oil Company, and Rocky Mountain Oil Corporation, in the sum of $19,905.85.

/s/ VANCE BIGLER,
Foreman.

The verdict was recorded in the presence of the jury and then read to them and they each confirmed the same.

October 6, 1955.

United States District Court for the District of Idaho, Eastern Division

No. 1876

LANUS WAYNE PRESTIDGE,

Plaintiff,

vs.

SHELL OIL COMPANY, a Corporation; and ROCKY MOUNTAIN OIL CORPORATION, a Corporation,

Defendants.

JUDGMENT

This cause came on for trial before the Court and a jury on October 5, et seq., 1955, both parties appearing by counsel, and the issues having been duly tried and the jury having rendered a verdict for plaintiff in the sum of $19,905.85,

It Is Hereby Ordered, adjudged and decreed that plaintiff recover of defendants, Shell Oil Company and Rocky Mountain Oil Corporation, the sum of $19,905.85, together with interest at the rate of 6% per annum from the 6th day of October, 1955, and his costs of action, and that the plaintiff have execution therefor.

[Seal] ED. M. BRYAN,
Clerk;

By /s/ NEVA ABBEY,
Deputy Clerk.

[Endorsed]: Filed October 6, 1955.

[Title of District Court and Cause.]

NOTICE OF TIME AND PLACE
OF TAXATION OF COSTS
No. 1876

To Hawley & Marcus, Claude Marcus, Attorney for Defendant, Shell Oil Company:

Please take notice that the bill of costs, a copy of which is hereto attached, will be presented to the Clerk of the above Court for taxation at his office in the United States Courthouse at Pocatello, Idaho, on the 13th day of October, 1955, at 2:00 o'clock in the afternoon of that day.

Dated October 10, 1955.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Title of District Court and Cause.]

No. 1876

MEMORANDUM OF COSTS AGAINST
SHELL OIL COMPANY

Disbursed by Plaintiff:

Filing Fee	$15.00
Service by U. S. Marshal	2.00
Service by Sheriff of Bear Lake County	1.40
Attorneys Docket Fee	20.00
	$38.40

Witness Fees:

Dr. R. B. Lindsay, Montpelier, Idaho

1 day's attendance	$ 4.00
1 day's subsistence	5.00
200 miles, @ 7c per mile	14.00
	$23.00
Total	$61.40

[An identical Memorandum of Costs was presented to Rocky Mountain Oil Co.]

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed October 11, 1955.

[Title of District Court and Cause.]

File No. 1876

MOTION OF SHELL OIL COMPANY FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT, OR FOR NEW TRIAL

Shell Oil Company, defendant above named, moves the court to set aside the verdict of the jury herein, and to set aside the judgment entered herein, and to enter judgment in favor of this defendant in accordance with its motion to dismiss and motion for directed verdict duly made herein, and if the

foregoing motion be denied to set aside the verdict and the judgment herein then to grant this defendant a new trial, said motions being made upon the following grounds and for the following reasons:

(1) That the court should have granted the motion to dismiss made by this defendant and should have granted motion for directed verdict at the close of the dvidence made by this defendant for the reason that the evidence of plaintiff herein was insufficient to constitute a cause of action against this defendant, and was insufficient as a matter of law upon which a verdict and judgment against this defendant could be based.

(2) The error of the court in refusing to grant the motion to dismiss and motion for directed verdict of this defendant.

(3) The error of the court in failing to give the instructions requested by this defendant and especially in failing to instruct the jury as a matter of law with respect to the relationship of the Shell Oil Company and the other defendant above named, and in submitting such question to the jury.

(4) The error of the court instructing the jury with reference to joint enterprise, principal and agent, and master and servant, the evidence being totally insufficient to show any such relationship between the Shell Oil Company and the other defendant in this action.

(5) The error of the court in the admission of evidence, especially that showing performance under

the Wheeler and Gray contract introduced in evidence herein.

(6) The error of the court in refusing to allow evidence that plaintiff in this action was the employee of the other defendant named in this action.

(7) That the verdict of the jury herein is completely contrary to the evidence and the disregard of the jury for the instructions given herein.

(8) That the verdict of the jury herein awarding damages to the plaintiff is grossly excessive and contrary to the evidence.

(9) That the verdict of the jury herein is against the weight of the evidence and grossly excessive.

(10) That the argument of counsel for plaintiff before the jury was improper and prejudicial.

Upon these grounds this defendant moves the court to set aside the verdict of the jury and judgment herein, and to enter judgment in favor of this defendant, or if the foregoing motion be denied to set aside the verdict and judgment, then to grant a new trial herein.

/s/ CLAUDE MARCUS,
Attorney for Shell Oil Company.

Receipt of copy acknowledged.

[Endorsed]: Filed October 11, 1955.

[Title of District Court and Cause.]

No. 1876

ORDER

This matter is before the Court at this time on Defendant Shell Oil Company's Motion to set aside the Judgment and enter Verdict in accordance with its Motion for directed verdict, duly made; and in lieu thereof, a motion for a new trial. Briefs have been filed and the Court has fully considered the same.

The matters alleged as error here, with which the Court is primarily concerned, are those numbered (3) and (4) in the motion, dealing with the failure of the Court to instruct as a matter of law with respect to the relationship of the Shell Oil Company and Rocky Mountain Oil Corporation, and the alleged error of the court in instructing the jury with reference to joint enterprise, principal and agent and master and servant; Shell Oil Company contending that the evidence was totally insufficient to show any such relationship between Shell Oil Company and the other defendant.

At the time of the trial of this case, before the jury, the questions presented by this Motion were presented to the Court on defendant's Motion for Directed Verdict. It was the court's opinion at that time that, rather than prolong the trial by going into an involved study of the points concerned, it should rule without delay, keeping in mind its right to rule

on a motion such as this after due consideration and deliberation. This the Court has now done.

Where facts are in dispute as to what the relation is between parties concerned, that determination must be left to the jury; but where that question is to be determined through contracts and agreements, as in the instant case, the relationship of the parties should ordinarily be found by the court.

The Court is of the opinion that the paper filed with the Bureau of Land Management was not effective to make Rocky Mountain Oil Corporation an agent of Shell Oil Company in all particulars, but was only for the express purposes therein stated.

As to whether a joint adventure existed, we must look to the contracts, the intentions of the parties and all the other attendant circumstances.

> "It is impossible to define the relationship of joint adventure with exactitude and precision. In many respects it is analogous to a partnership, the main difference being that a joint adventure is more limited in its scope of operation than a partnership. In the main, some of the relevant factors of a joint adventure are that there must be joint interest in the property; there must be an agreement, express or implied, to share in the profits and losses from the venture; there must be action and conduct showing co-operation in the property. It has been held that it is not absolutely necessary that there be

participation in both profits and losses. While it is possible to lay down the general characteristics of a joint adventure, in the end, whether a certain transaction constitutes such a relationship can be determined only from a full consideration of all the relevant facts and circumstances in each particular case." Kasishke v. Baker (10th Cir.), 146 F 2d 113 at 115.

Here there was no control over the well drilling by Shell Oil; while interested in the outcome, it was not concerned with the methods or means employed. Certainly it does not appear that either party intended this as a joint venture. There was no participation in profits and losses. The agreement provides that all costs incurred by the drillers, of any nature, were to be borne by them. In case of a dry hole they were to be paid a definite sum per foot of depth of the hole. In case the well was a success there was a provision for a royalty fee. After due consideration, the Court feels that under the contracts, agreements and assignments involved herein, and the somewhat lengthy and, in some respects, detailed provisions thereof, the relationship was one of independent contractor.

For these reasons the Court feels, without going into the other matters alleged as error, that it should grant the Motion of Shell Oil Company for Judgment in accordance with the Motion for a Directed Verdict, and

It is so Ordered.

Dated this 8th day of March, 1956.

/s/ CHASE A. CLARK,
Chief Judge, United States District Court, District of Idaho.

The Judgment will stand as against the Rocky Mountain Oil Corporation.

[Endorsed]: Filed March 9, 1956.

In the United States District Court for the District of Idaho, Eastern Division

No. 1876

LANUS WAYNE PRESTIDGE,

Plaintiff,

vs.

SHELL OIL COMPANY, a Corporation; ROCKY MOUNTAIN OIL CORPORATION, a Corporation, and STONY POINT DEVELOPMENT, INC., a Corporation,

Defendants.

JUDGMENT

This cause came on for trial before the court and jury on October 3rd and 4th, 1955, both parties appearing by counsel. At the conclusion of the trial counsel for defendant Shell Oil Company, a corporation, moved for a directed verdict in behalf of said defendant, which motion the court denied and a verdict was rendered by the jury for plaintiff

against both of the above-named defendants in the amount of $19,905.85. Subsequently, said defendant, Shell Oil Company, a corporation, moved to vacate the judgment in behalf of plaintiff and against this defendant, and have judgment in behalf of said defendant in accordance with its motion for directed verdict. After consideration the court has granted said motion, now, therefore,

It Is Hereby Ordered, Adjudged and Decreed that the judgment heretofore entered in behalf of plaintiff as against Shell Oil Company, a corporation, should be and the same is hereby vacated and set aside.

It Is Further Ordered, Adjudged and Decreed that plaintiff take nothing against defendant Shell Oil Company, a corporation, herein and that said Shell Oil Company have and recover of and from the plaintiff its costs of action in the amount of $36.00, and have execution therefor.

Dated March 23rd, 1956.

/s/ CHASE A. CLARK,
District Judge.

Service of copy acknowledged.
[Endorsed]: Filed March 23, 1956.

[Title of District Court and Cause.]

No. 1876

NOTICE OF TIME AND PLACE OF TAXATION OF COSTS

To: Glenn A. Coughlan, Attorney for Plaintiff Lanus Wayne Prestidge:

Please take notice that the bill of costs, a copy of which is hereto attached, will be presented to the Clerk of the above Court for taxation at his office in the United States Courthouse at Pocatello, Idaho, on the 21st day of March, 1956, at 10:00 o'clock in the morning of that day.

Dated March 16, 1956.

HAWLEY & MARCUS,

By /s/ CLAUDE MARCUS,
Attorneys for Shell Oil Company.

[Title of District Court and Cause.]

No. 1876

MEMORANDUM OF COSTS

Disbursed by defendant, Shell Oil Company, a Corporation:

Attorney's docket fee $20.00

Witness fees:

John J. McIntyre	
1 day's attendance	4.00
1 day's subsistence	5.00
200 miles at $.07 per mile	7.00
John E. Mohr	
1 day's attendance	4.00
1 day's subsistence	5.00
200 miles at $.07 per mile	7.00
Total	$52.00

Costs taxed this 29th day of March, 1956, in the amount of $36.00.

/s/ ED. M. BRYAN,
Clerk.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed March 23, 1956.

[Title of District Court and Cause.]

No. 1876

MOTION FOR NEW TRIAL

Lanus Wayne Prestidge, Plaintiff herein, moves the court for an order setting aside its order of March 8, 1956, and setting aside the Judgment entered herein on March 23, 1956, and granting a partial new trial pursuant to Federal Rules and Procedure 59, or in the alternative, should the court

deem it proper, an entire new trial upon the following grounds:

1. The error of the Court in granting the defendant Shell Oil Company's Motion for directed verdict.

2. The error of the Court in entering judgment for the defendant, Shell Oil Company, contrary to the verdict of the jury.

3. The errors of the Court in finding in its order of March 8, 1956, that:

(a) Rocky Mountain Oil Corporation was an independent contractor of Shell Oil Company.

(b) The question of relationship of the parties was one for the court.

(c) The Designation of Operator and Agent filed by Shell Oil Company was not effective to make Rocky Mountain Oil Corporation an agent of Shell Oil Company.

(d) The relationship of joint adventure or master and servant did not exist.

4. That the Court erred in that:

(a) The findings of March 8, 1956, are against the evidence.

(b) The findings of March 8, 1956, are against the law.

5. Newly discovered and material evidence, discovered since the trial, and which could not have been obtained on the trial by the exercise of reason-

able diligence, as more fully appears from the affidavits of Edmund W. Windolph, Clarence S. Robinson and Glenn A. Coughlan attached hereto and made a part hereof.

Dated this 27th day of March, 1956.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

[Title of District Court and Cause.]

File No. 1876

AFFIDAVIT OF WITNESS WHO WILL GIVE NEWLY DISCOVERED EVIDENCE

State of Colorado,
County of Denver—ss.

Clarence S. Robinson, being first duly sworn, deposes and says:

That he resides at Loveland, Colorado, and was Drilling Superintendant on an oil well drilling job for Rocky Mountain Oil Company and Shell Oil Company called "Give Out Structure" located approximately 13 miles northwest of Montpelier, Idaho;

That he started rigging up this job in May of 1954;

That he was drilling under the direct supervision of Mr. McIntyre who was the geologist for Shell Oil Company. Mr. McIntyre gave him specific instructions not to start drilling until he, Mr. McIntyre, was there; Mr. McIntyre was to be there all the time. Mr. McIntyre stayed in a motel in

Montpelier, Idaho. Mr. McIntyre gave affiant specific instructions on how to keep up the mud used in the drilling operation and told affiant he should put quebracho and caustic in it; affiant was not to drill unless Mr. McIntyre, the Shell geologist, was there and was to wait on him to get there; Mr. McIntyre. the Shell geologist, had authority to stop the job at any time and did stop him five times; affiant was stopped by Mr. McIntyre also to circulate for samples; affiant was drilling under his direct supervision; Mr. McIntyre took daily samples two or three times a day; he made the "sample catcher," one of the employees, catch him some two foot samples several times.

Affiant went to Mr. McIntyre's quarters in Montpelier one night and advised him of the drilling situation whereupon Mr. McIntyre stopped affiant from drilling and told affiant to circulate and take two-minute samples; Mr. McIntyre had complete control of the operation and was a direct supervisor of affiant's as to anything that had to do with the drilling of the hole: he told affiant when to start and when to stop; affiant looked to Mr. McIntyre for direct instructions and even before affiant started drilling affiant called Mr. McIntyre and advised that he was ready to start operations and Mr. McIntyre told affiant to wait until he got there and that he would start with the job right then;

Affiant was instructed by Mr. Ed Windolph, the General Superintendant of the oil well drilling operation, that he was to take orders from the Shell

Oil Company geologist, Mr. McIntyre, and to follow his instructions in regard to anything that had to do with the drilling of the hole;

That affiant did not communicate the facts aforesaid before the trial and until after the trial because affiant left the State of Idaho on or about July 13, 1954, and went into Colorado and later to Nebraska and back to Colorado and has been in those states since; affiant did not consider it his place to discuss the matter.

Dated this 24th day of March, 1956.

/s/ CLARENCE S. ROBINSON.

State of Colorado,
County of Denver—ss.

Sworn to and subscribed to before me this 24th day of March, 1956.

[Seal] /s/ MARION C. DARLING,
Notary Public.

My Commission expires January 19, 1960.

[Title of District Court and Cause.]

File No. 1876

AFFIDAVIT OF WITNESS WHO WILL GIVE NEWLY DISCOVERED EVIDENCE

State of Colorado,
County of Denver—ss.

I, Edmund W. Windolph, being first duly sworn, depose and say:

That I reside at Brush, Colorado, and was employed by Rocky Mountain Oil Corporation as general superintendent over the entire drilling operation called "Give Out Structure" located about 13 miles northwest of Montpelier, Idaho;

That this job was started in the month of May, 1954, and I received instructions pertaining this drilling operation from the geologist of Shell Oil Company, Mr. McIntyre; I was advised that we were to drill the hole under the supervision of the Shell Oil Company geologist and that he was to be on the job before we commenced drilling operations; I instructed Clarence Robinson, the drilling superintendent, to follow the orders of the Shell Oil Company geologist and told Mr. Robinson that if the geologist told him to shut down he should do so and that Mr. McIntyre was his direct supervisor as to anything that had to do with the drilling of the hole; it was our understanding that we were not to drill a foot of the hole without Shell Oil Company being represented; the geologist of Shell Oil Company, Mr. McIntyre, had complete supervision and we were not to drill a single inch without their representative being there; I called Mr. Gamble, the head man for Shell Oil Company at Grand Junction, Colorado, and he was to call the geologist and we were to wait until the geologist was on the premises before we started drilling; I was given to understand that we were to abide fully by Shell Oil Company's wishes in the drilling of the well by my superior Mr. John McIntyre; if the well drill-

ing operations were shut down for any reason on account of Shell's orders it was all right but if for any other reason then it was under my direct supervision and I was responsible for it; I gave orders to the crew that they were to follow the orders of the geologist; at any time we lost circulation, if Mr. McIntyre, the geologist, was not present, we always sent someone in after Mr. McIntyre so that he could be present after we regained circulation and were ready to drill.

That the deponent did not communicate the facts aforesaid to the plaintiff before trial and until after trial in this action for the reason that affiant left Idaho after July 12, 1954, and was in Colorado thereafter and specifically did not reveal any of the above facts upon the advice of his counsel prior to trial even though he was interviewed at one time by the plaintiff prior to the action and before the trial was started.

/s/ EDMUND W. WINDOLPH.

Sworn to and subscribed to before me this 24th day of March, 1956.

[Seal] /s/ MARION C. DARLING,
Notary Public.

My Commission expires January 19, 1960.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Ada—ss.

Glenn A. Coughlan, being first duly sworn, deposes and says:

That this action was tried on the 5th and 6th days of October, 1955, before the Court and jury and a verdict was rendered in favor of the plaintiff and against the defendants for the sum of $19,905.85 damages and costs, and Judgment was thereupon entered on the 6th day of October, 1955.

The defendant Shell Oil Company made Motion for Directed Verdict in the above matter prior to the submission of the cause to the jury, and subsequent to jury verdict and judgment thereon made a Motion for Judgment in Accordance With Motion for Directed Verdict or for New Trial, and the Court by Order of March 8, 1956, granted the Motion of the defendant Shell Oil Company for Directed Verdict and Judgment thereon was entered on March 23, 1956.

That since the trial of the action deponent has discovered certain new evidence.

The newly discovered evidence consists of testimony of Edmund W. Windolph, General Superintendent of the oil well drilling operation, showing that the defendant Shell Oil Company was in con-

trol and exercised control of the oil well drilling operation, and that said general Superintendent was subject to their orders and so instructed his men; and said newly discovered evidence further consists of testimony of Clarence S. Robinson, the drilling boss, that he was under the direct supervision and subject to the orders of the Shell Oil Company's geologist who was on the premises at all times and who gave orders and controlled the entire operation, all as more fully appears by the affidavits of said witnesses attached hereto and made a part hereof.

Deponent had no knowledge of the existence of the newly discovered evidence at the time of trial of the cause and had used due diligence to obtain all testimony necessary to support the issue on his part.

That the witness Edmund W. Windolph was interviewed prior to the trial and declined to give the facts at that time because he was advised by his counsel not to do so for which reason the deponent was unable to learn facts of which the witness said Edmund W. Windolph had in his possession.

That deponent was unable to obtain the testimony of the witness Clarence S. Robinson for the reason that the said Clarence S. Robinson left the state immediately after the oil well job was finished on or about the 13th day of July, 1954, and went to Colorado and then to Nebraska before deponent was consulted in the matter; that because of the unavailability of the said Clarence S. Robinson and the

lack of funds of the plaintiff to make extensive investigation without the State of Idaho, he was unable to obtain the testimony of Clarence S. Robinson until after the trial of the action herein wherein the said witnesses voluntarily came forward and gave the facts as contained in the affidavits herein.

That because of the above, the plaintiff was unable to produce any witness to the facts aforesaid on the former trial; that diligent search within his means and inquiry for witnesses and evidence to prove the facts was made, but plaintiff could find or learn of no one by whom said facts could be proven.

The newly discovered evidence has a material bearing on the issues involved in this cause because it shows complete control and co-operation in the operation of the oil well drilling operation by the defendant Shell Oil Company and establishes its liability without question.

/s/ GLENN A. COUGHLAN.

Subsecribed and Sworn to before me this 27th day of March, 1956.

/s/ FERNE WITT,
Notary Public for Idaho.

Receipt of copy acknowledged.

[Endorsed]: Filed March 27, 1956.

[Title of District Court and Cause.]

No. 1876

SUPPLEMENTAL MOTION
FOR NEW TRIAL

Comes now the Plaintiff and makes this explanatory supplement to the Motion for New Trial heretofore filed;

Plaintiff hereby limits the Motion for New Trial to the Defendant Shell Oil Company only, the judgment against Defendant Rocky Mountain Oil Corporation having become final.

Dated: April 2, 1956.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed April 2, 1956.

[Title of District Court and Cause.]

No. 1876-E., Civil

MINUTES OF THE COURT

April 6, 1956

This cause came on for hearing on plaintiff's motion for a new trial as to the defendant Shell Oil Company, Glenn A. Coughlan appearing for the plaintiff and Claude Marcus appearing for the defendant.

After hearing argument of counsel, the motion was, by the Court, taken under advisement and plaintiff was given five days to file opening brief and defendant the five days following to answer.

In the District Court of the United States, in and for the District of Idaho, Eastern Division

Nos. 1875 and 1876

WILLIAM G. WUTHRICK,

Plaintiff,

vs.

SHELL OIL COMPANY, a Corporation; ROCKY MOUNTAIN OIL CORPORATION, a Corporation, and STONY POINT DEVELOPMENT, INC., a Corporation,

Defendants.

LANUS WAYNE PRESTIDGE,

Plaintiff,

vs.

SHELL OIL COMPANY, a Corporation; ROCKY MOUNTAIN OIL CORPORATION, a Corporation, and STONY POINT DEVELOPMENT, INC., a Corporation,

Defendants.

MOTION FOR EXTENSION OF TIME AND PERMISSION TO FILE COUNTER AFFIDAVITS

The defendant, Shell Oil Company, respectfully moves the court for extension of time to and in-

cluding the 15th day of April, 1956, in which to file affidavits in opposition to the motion for new trial made herein by plaintiff.

Copies of the affidavits proposed to be filed herein are attached hereto and this motion is made and based upon the same and upon the files and proceedings herein.

HAWLEY & MARCUS,

By /s/ CLAUDE MARCUS,
Attorneys for Shell Oil Company.

[Title of District Court and Causes.]

Nos. 1875 and 1876

AFFIDAVIT OF LOREN B McINTYRE

State of Utah,
County of Salt Lake—ss.

Loren B. McIntyre, first being duly sworn, deposes and says:

That he is a resident of Grand Junction, Colorado, and is employed as a geologist for the Shell Oil Company, a corporation, one of the defendants in this action;

That he has examined in detail the affidavits submitted by the plaintiffs in this action, and more particularly the affidavits of Clarence S. Robinson and Edmund W. Windolph;

That he arrived at the drilling site which was being drilled by Rocky Mountain Oil Corporation at the "Give Out Structure" located approximately 13 miles northwest of Montpelier, Idaho, on the evening of June 1, 1954;

That he went to the well site that evening but upon ascertaining that no one was present at the site he returned to Montpelier, Idaho, and did not return to the well site until June 2, 1954, at approximately 6:00 a.m.;

That he had previously talked to Mr. Edmund W. Windoph by telephone from Grand Junction, Colorado, on or about May 30, 1954, and that said Edmund W. Windolph had informed him that they had started to drill and that the rig had temporarily broken down and would possibly not be repaired for another few days, and that he informed Mr. Windolph that he would be at the well site on June 1st or 2nd to collect geological data for the Shell Oil Company;

That he arrived at the well drilling site on the morning of June 2, 1954, and that he was present at the time plaintiffs to this action were injured and that he was standing near the fire as a spectator waiting for Mr. Robinson who was still asleep in a truck owned by the Rocky Mountain Oil Corporation;

That he is employed as a geologist for the Shell Oil Company and that his sole duties are to collect geological data for the Shell Oil Company, con-

sisting of collecting samples or cuttings from the well, checking cores, reporting drilling data such as depth of the well, location of various geological structures, and the depth in which certain geological formations were found in the ground being drilled, and that this was his sole duty in connection with the drilling of the well, and that affiant had no control whatsoever over any of the drilling operations, that he did not direct or supervise in any manner the employees of the Rocky Mountain Oil Corporation who were in charge of the drilling project and that he did not have any authority and did not exercise or attempt to exercise in any way any supervision or control over any personnel on the drilling site:

That the affidavit submitted by Mr. Robinson is a complete mis-statement of fact with regard to the allegations that affiant gave Mr. Robinson specific instructions not to start drilling until affiant was present and that affiant gave specific instructions or any instructions on the manner in which the mud should be used in the drilling operations or that quebracho and caustic should be added to the drilling mud and that affiant told Mr. Robinson that no drilling should be conducted unless he was present, or that he had any authority to stop the job at any time, and affiant specifically denies all of the above allegations and further denies that he stopped the drilling at any time;

That while the well drilling equipment was in operation that he did procure daily samples of

cuttings from "sample catchers" to check geological formations but that these samples were to 5 foot and 10 foot samples and not 2 foot samples as alleged by Clarence Robinson;

That at the 1,540 foot level on June 9, 1954, sample cuttings indicated possible oil bearing strata and that at this level Mr. Robinson and Mr. Windolph circulated the strata so that cuttings could be obtained to determine whether this area was a possible oil bearing strata, and that the circulation of this area was ordered by Mr. Windolph and Mr. Robinson in accordance with good oil drilling practice and not through any direction of affiant;

That the affidavits submitted by Mr. Robinson and Mr. Windolph are incorrect statements of fact in connection with the allegation of the affiant's control over the operation and affiant specifically denies that he was a direct supervisor of Mr. Robinson or Mr. Windolph and he specifically denies that he told Mr. Robinson or Mr. Windolph when to start drilling operations and when to stop or that he has requested the drilling to be stopped or that he has requested them not to resume drilling until he was on the job;

That affiant did advise Mr. Robinson and Mr. Windolph on several occasions when well drilling equipment had broken down to advise affiant when drilling operations resumed so that he would not have to remain at the well site when no geological information could be obtained:

That on two occasions affiant was advised following a breakdown that drilling had resumed, but on most occasions it was necessary for him to go to the well site to determine whether drilling was in progress and that during the time drilling was in progress affiant collected samples for examination and that he spent only one to two hours at the drilling site each day that drilling was in progress;

That in one area where lost circulation had occurred affiant asked Mr. Windolph if he could core a section of the well for examination, and Mr. Windolph advised affiant that this could be done, but Mr. Robinson stated that they could not cut a core because they had lost circulation material in the mud and this material would plug up the core barrel;

That affiant was on the drilling site from June 2, 1954, to approximately July 14, 1954, at which time the well had been drilled to a depth of 3,300 feet and that at no time during this drilling was any core taken or requested other than the request shown in the preceding paragraph, and that on the 14th after Rocky Mountain Oil Corporation stopped the drilling process due to liens being placed on their equipment, affiant left the drilling site and returned to Grand Junction, Colorado;

That the affidavits of both Mr. Robinson and Mr. Windolph are a complete mis-statement of fact in connection with any of the statements on the exercise of control, as to affiant's supervision of the job or that affiant had any authority or exercised

ny control over the drilling operations or the ersonnel connected with the drilling of this well, nd affiant further states that the complete super- ision and control of the project was in Mr. Win- olph and Mr. Robinson as employees of the Rocky Iountain Oil Corporation and that affiant was the nly employee of Shell Oil Company who was on his job and that affiant at no time exercised or ttempted to exercise in any manner, any control or irection over the operation or the manner of opera- ion of the drilling which was being conducted by Rocky Mountain Oil Corporation and that affiant's ole duty was to collect samples for geological in- ormation and that this was his sole duty in con- ection with the operation of this well.

Dated this 12th day of April, 1956.

/s/ LOREN B. McINTYRE.

tate of Utah,
County of Salt Lake—ss.

Sworn to and subscribed to before me this 12th ay of April, 1956.

[Seal] /s/ ANNIE OSBORNE,
Notary Public.

My Commission expires 9-3-57.

[Title of District Court and Causes.]

Nos. 1875 and 1876

AFFIDAVIT IN OPPOSITION TO MOTION FOR NEW TRIAL

State of Idaho,
County of Ada—ss.

Claude Marcus, being first duly sworn, deposes and says:

That he is attorney for the Shell Oil Company in the above-entitled action; that he makes this affidavit in opposition to the motion for new trial made herein by plaintiff.

That affiant was and has been unable to locate Loren B. McIntyre geologist for Shell Oil Company named in the affidavits filed in support of the motion for new trial until recently; that the affidavit of said McIntyre has been obtained and is attached to the motion herein.

That attached hereto are statements made on the dates shown therein by Clarence S. Robinson and Ed Windolph, affiants who purportedly executed the affidavits attached to the motion of plaintiff for new trial herein.

That it is respectfully requested that Shell Oil Company be allowed to file and submit this affidavit and the affidavit of the said Loren B. McIntyre, submitted herewith.

/s/ CLAUDE MARCUS.

Subscribed and Sworn to before me this 13th day of April, 1956.

[Seal] /s/ CATHERINE L. HALL,
Notary Public for Idaho.

3-3-55.

I am Clarence Robinson, age 42, Trans-O-Tel, Brush, Colorado. My address will be General delivery, Brush, Colo., for the forseeable future. I can always be reached 12850 E. Colfax, Trailer Haven, Aurora, Colo., c/o D. L. McDaniel. On 6-2-54, I was working as a Tool-Busher on a drilling job for the Rocky Mountain Oil Co. I was employed by E. W. Windolph of that company and worked for them on this job only. This was a Wildcat operation and we had been at this location for about 2 weeks. Wuthrick and Prestidge had stopped me in town, Montpelier, on about June 1, 1954, and asked me for work on the rig. I told them there were no openings at all and told them there would be none. I made it very clear to them that there was no work for them on our rig and other employees had also told them that we had no work. I worked all night that night and went to sleep in a pickup on the job and told Pop McDaniel not to wake me. This was about 6 a.m. About 7 a.m. Wuthrick and Prestidge came out to the location. There were signs prohibiting trespassing at the gate to the field and also at the rig and they passed both of these signs when crossing to the rig. This rig was 18

miles from town, Montpelier, and they had driven out in an old car. I was asleep when they came out and knew nothing of their presence at the rig until I was awakened and told about the fire. I had Doleman take them to the hospital.

I do not know what Shell Oil had to do with this job but I think they had farmed this well out to the Rocky Mountain Oil Co. Shell Oil's geologist, McIntyre, was at the site about ¼ of the time getting geological data. He was not supervising or doing any work for us at all. His only job was collecting geological data for Shell and that is all he did. Windolph owns the Stoney Point Development Co., but it was not involved in the well we were drilling. He was working for the Rocky Mtn. Oil Co. when we were drilling and as far as I know, he was on salary just like the rest of us. Pop McDaniel, Rufus Doleman, and I were the only employees of Rocky Mountain Oil Co. who present when the accident happened and the only two other persons present were the men who got burned. Windolph arrived at the location right after the fire.

I have read the above 1⅔ pages and they are true to the best of my knowledge.

CLARENCE ROBINSON.

Writing Ryman.

Feb. 11, 1955.

I am Mr. E. W. (Edmond) Windolph of 335 Empire Bldg., Denver, Colo., and 112 Edison, Brush, Colo., Muns Addition. I am President of Stoney Point Development Co. but I do now act as an officer for Rocky Mountain.

I had agreed to supervise drilling an oil well for Rocky Mountain on an expense and wage basis in consideration for Mr. McIntire setting the Crown Uranium Company. Rocky Mt. had the oil site on a farm-out basis from Shell Oil Co. I had no interest whatsoever in the oil well or oil site. It was strictly a wage expense deal.

On approx. June 1st I had come into Montpelier, Idaho., from the rig at approx. 9 *m.m.* There were 2 boys waiting at the hotel to see me about getting a job. I told them they would have to see Clarence Robinson, driller and tool pusher, when he came into town from the rig. I told them not to go out to the rig to see him. The next morning I started out for the drilling site and I had gotten approx. ½ mile from the site when I saw a small unusual column of smoke. I got closer and saw the men running around. When I arrived at the scene there was McIntyre, geologist for Shell, Clarence Robinson, Pop McDaniels and another man who I cannot recall, but whose name would be on the wage sheet at Casper. Clarence Robinson is presently at Traveltel Motel, Brush, Colo., as is Pop McDaniels and the other man is from Montpelier, Idaho, where he runs a welding shop (father works on a railroad).

The above three were employed by Rocky Mountain. There were two other men there who had been burned. I asked what happened and McIntyre said the two had been burned and they had had a very difficult time catching them as they had run all over. McIntyre said the unnamed person above was going to put some oil on the fire and had stated "Get back boys I am going to put some oil on the fire." McIntyre said he moved back but the other two men didn't move back. The unknown person apparently tripped and the fire resulted. The burned men were the same two I had talked to the night before and I don't know whether they had been successful in contacting Clarence that night. I asked Clarence what had happened and he told me the two men had asked him for a job and he told them no and to stay away from the rig. However, it was cold, so instead of leaving, they sat around the fire. It was extremely cold and it was necessary to have a fire every day.

Two "No trespassing" signs had been posted, one at the gate and one at the rig because it was a tide hole and didn't want to let anyone have any information about it. Although there was supposed to be liability insurance on the rig, it wasn't in force at the time. Rocky Mountain did have Workman's Compensation coverage in Idaho at the time. I don't know whether Rocky Mountain was set up to do business in Idaho or not, but I know Stoney Point definitely does not.

Shell's employee, McIntyre, had absolutely no

authority on the job and anything he wanted done he asked me and it was done through me. He was a geologist and had no authority and did not exercise any.

I have read the above 3⅛ pages and it is true to the best of my knowledge.

E. W. WINDOLPH,

Receipt of copy acknowledged.

[Endorsed]: Filed April 13, 1956.

[Title of District Court and Cause.]

Nos. 1875 and 1876

OBJECTION TO MOTION FOR EXTENSION OF TIME IN PERMISSION TO FILE COUNTER AFFIDAVITS

Come Now the plaintiffs in the above-entitled matters and object to defendant Shell Oil Company's Motion for an Extension of Time and Permission to file Counter Affidavits upon the following grounds and for the following reasons:

1. That said Motion is made too late for the reason that Federal Rules of Civil Procedure No. 59(c) provides that opposing affidavits must be filed within ten days of the time the original affidavits and Motion are filed; that the original affidavits in this matter and Motion for new Trial was filed upon the 27th day of March, 1956.

2. That defendant's Motion and affidavits are filed too late for the reason that Federal Rules of Civil Procedure No. 6(d) provides that opposing affidavits must be filed at least one day prior to the hearing of the Motion; that the Motion for New Trial was argued on the 6th day of April, 1956.

3. That the defendant appeared on argument for Motion for New Trial on the 6th day of April, 1956, without filing any Motion or counter affidavits or making any request to the Court at that time for extension of time or assigning any reason for his failure to file counter affidavits at that time.

4. That the defendant has assigned no reasonable excuse for the failure to file affidavits except flimsy statement that he has been unable to locate the Shell Geologist; and he makes no statement of diligence as to what action was taken to locate Mr. McIntyre though he is as appears by his affidavit an employee of the defendant Shell Oil Company and could, of course, be located in a few moment's time merely by contacting the defendant's headquarters in the vicinity.

5. That the defendant has shown a complete disregard for the rules of the court and of the Federal Rules of Civil Procedure in respect to the timely filing of documents by the lack of diligence.

6. That the defendant attempts to inject into the case improper matter purporting to be unsworn statements of Clarence S. Robinson and Ed Win-

dolph, these statements having no standing in this matter whatsoever.

7. This Motion is based upon the records and files of the proceedings herein together with the affidavit of plaintiffs' attorney attached hereto.

Dated this 16th day of April, 1956.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiffs.

[Title of District Court and Causes.]

Nos. 1875 and 1876

AFFIDAVIT IN OPPOSITION TO MOTION FOR EXTENSION OF TIME AND PERMISSION TO FILE COUNTER AFFIDAVITS

State of Idaho,
County of Ada—ss.

Glenn A. Coughlan, being first duly sworn, deposes and says:

That he is attorney for the plaintiffs in the above-entitled action; that he makes this affidavit in opposition to the Motion for Extension of Time and Permission to File Counter Affidavits by the defendant Shell Oil Company;

That defendant Shell Oil Company failed to file counter affidavits to plaintiffs' Motions for New

Trial and affidavits in support thereof within the time allowed, and appeared on argument for a Motion for New Trial and made no application at that time to file counter affidavits and did not assign any reason for his failure to do so before the Honorable Fred Taylor who heard said Motion and defendant's attorney was advised by the court at said time that he had made no showing and that there was nothing before the court and no showing in the record in opposition to plaintiffs' Motion, and that defendant was now too late to make filing;

That defendant in an obvious attempt to rectify his lack of diligence after learning of the court's attitude attempts to file his affidavit containing the flimsy excuse that he has been unable to locate the employee of the defendant without setting forth that any attempt whatever was made prior to the hearing of the Motion for New Trial or making any showing of what diligence was exercised to obtain the tardy affidavit he now seeks to file; that defendant has exhibited a complete lack of diligence in this matter and is not entitled to have his tardy Motion and affidavits accepted by the court;

That defendant is attempting to inject improper matter into the cases by the filing of alleged purported statements of Clarence S. Robinson and Edmond Windolph which are purely hearsay of the second degree and that the affidavit of the attorney for the defendant is improper in attempting to inject unsworn purported statements of someone else which are not identified or certified in any way;

That defendant's attorney's affidavit assigns no reasonable excuse for the failure to file the affidavits within the time required and said affidavits and statements should be stricken for the reason that they are tardy, sham and frivolous.

/s/ GLENN A. COUGHLAN.

Subscribed and Sworn to before me this 16th day of April, 1956.

[Seal] /s/ C. STANLEY SKILES,
Notary Public for Idaho.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 16, 1956.

[Title of District Court and Causes.]

Nos. 1875 and 1876

MOTION TO STRIKE FROM THE FILES

Come Now the plaintiffs in the above-entitled matters and respectfully move the court to strike from the files in this case the affidavit of Loren B. McIntyre upon the ground that the same is filed too late pursuant to Federal Rules of Procedure Nos. 6(d) and 59(c);

And plaintiffs further move to strike the affidavit of defendant's attorney and statements attached to said affidavit purporting to be statements of Clarence Robinson and Edmond Windolph as not

being proper supporting documents, not being sworn to or being properly identified in order to entitle them to any weight whatsoever, such documents being a patent obvious attempt by the defendant Shell Oil Company to obtain an unreasonable and unfair advantage by injecting material into these cases which are not properly a part thereof.

Dated April 16, 1956.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed April 16, 1956.

[Title of District Court and Cause.]

No. 1875

ORDER

This matter is before the Court at this time on Defendant Shell Oil Company's Motion for Extension of Time and Permission to File Counter Affidavits to which the Plaintiff objects and has moved to strike the said affidavit. These matters are in relation to the primary matter herein which is Plaintiff's Motion for a New Trial.

The Motion for Extension is hereby granted and the Counter Affidavit filed as part of the record herein.

Briefs have been submitted on the Motion for New Trial and the Court has fully considered the same. The Court is of the opinion that for the reasons stated in the Motion, supported by Affidavits, the Motion for New Trial should be granted.

Now, Therefore, it is hereby Ordered that the Motion be and the same is hereby granted, and that a New Trial in its entirety, as to all questions presented, be and the same is hereby Ordered.

Dated this 26th day of April, 1956.

/s/ CHASE A. CLARK,
Chief Judge, United States District Court, District of Idaho.

[Endorsed]: Filed April 26, 1956.

[Title of District Court and Cause.]

File No. 1876

NOTICE TO TAKE DEPOSITION UPON ORAL EXAMINATION

To Shell Oil Company, a Corporation, and Its Attorney Claude V. Marcus, Eastman Building, Boise, Idaho:

Please Take Notice, That at 2:00 o'clock p.m. on the 19th day of May, 1956, the plaintiff, Lanus Wayne Prestidge, in the above-entitled action, will take the deposition of Doctor R. B. Lindsay who resides at Montpelier, Idaho, at his office in the

First Security Bank Building, Montpelier, Idaho, upon oral examination before an officer authorized by law to take depositions. The oral examination will be taken pursuant to the Federal Rules of Civil Procedure and will continue from day to day until completed. You are invited to attend and cross-examine.

Dated this 12th day of May, 1956.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 12, 1956.

[Title of District Court and Cause.]

No. 1876

MOTION FOR SUMMARY JUDGMENT

Shell Oil Company, a defendant above named, a corporation, hereby moves the court to enter summary judgment for said defendant and against the above-named plaintiff in accordance with the provisions of Rule 56, of the Rules of Civil Procedure. This motion is made and based upon the affidavits of Clarence Robinson and E. W. Windolph filed in this case in support of the motion for new trial made by the above-named plaintiff which has been granted, and upon the affidavits of Claude Marcus and Loren B. McIntyre, filed in this case in opposi-

tion to said motion for new trial by plaintiff, and upon the affidavits which the defendant is requesting permission to hereinafter file supplementing and supporting this motion for summary judgment, and upon the files and proceedings herein.

The said defendant respectfully asks permission to file such supplemental affidavits at any time prior to May 24th, 1956.

Dated May 14, 1956.

/s/ CLAUDE MARCUS,
Attorney for Shell Oil Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 14, 1956.

[Title of District Court and Cause.]

No. 1876

MOTION TO POSTPONE TRIAL OF CASE

Shell Oil Company, defendant above named, moves that the trial date of May 24th, 1956, for the above-entitled case be vacated and that the trial of said case be postponed and reset at some future date at least 10 days later than May 24th, 1956, upon the following grounds and for the following reasons:

(a) That it is not possible for this defendant to properly prepare for said trial by May 24th, 1956.

(b) That a new trial has been granted herein upon the basis of affidavits made by a Clarence Robinson and E. W. Windolph; that this defendant desires sufficient time to take the deposition of each of said witnesses under oath prior to the time of trial and since said witnesses reside out of the State of Idaho and in the State of Colorado, there will be insufficient time to do so prior to May 24th, 1956.

(c) That a Pop McDaniel, an employee who was working at the well drilling job described in this case, is a material and necessary witness for the defendant; that despite diligent inquiry and effort to locate him the defendant has been unable to ascertain the present whereabouts of said witness, but is endeavoring to locate said witness through a brother who resides in the State of Kansas.

(d) That defendant desires to obtain medical examination of the above-named plaintiff prior to trial and needs additional time in which to obtain such examination.

This motion is made and based upon the above allegations, the attached affidavit of Claude Marcus and upon the files and proceedings in this action.

Dated May 14, 1956.

/s/ CLAUDE MARCUS,
Attorney for Shell Oil Company.

[Title of District Court and Cause.]

No. 1876

AFFIDAVIT OF CLAUDE MARCUS

State of Idaho,
County of Ada—ss.

Claude Marcus, being first duly sworn, deposes and says:

That he is attorney for Shell Oil Company in the above-entitled action; that immediately after being advised that the above case was set for trial May 4th, 1956, affiant made a trip to Salt Lake City May 7, 1956, for the purpose of locating witnesses whose testimony will be material on a new trial of this case, especially the testimony of a Pop McDaniel. That affiant endeavored to locate said witness by inquiry from Mr. John McIntyre, President of Rocky Mountain Oil Corporation, one of the above-named defendants, and the last known employer of said Pop McDaniel. That affiant has been unable to ascertain the whereabouts of said witness through inquiry from this and other sources and is now endeavoring to locate the witness through a brother residing in Kansas.

That this defendant considers it advisable and necessary to the defense of this case to obtain physical examination of the above-named plaintiff and to take depositions of other witnesses in said case; that it is impossible for the defendant to obtain such testimony and adequately prepare this case

prior to May 24th, 1956, and for that reason this defendant is respectfully asking a postponement of the trial of this case to a date at least 10 days later.

/s/ CLAUDE MARCUS.

Subscribed and Sworn to before me this 14th day of May, 1956.

[Seal] /s/ CATHERINE L. HALL,
Notary Public for Idaho.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 14, 1956.

[Title of District Court and Cause.]

No. 1876

SUPPLEMENTAL ORDER

It is hereby Ordered that the Order made on the 26th day of April, 1956, granting a New Trial in the above-entitled matter be, and the same is hereby, amended by inserting in the fourth paragraph in the next to the last line of said order, after the word "entirety" and before the word "as" the words "as to the Shell Oil Company."

Dated this 16th day of May, 1956.

/s/ CHASE A. CLARK,
Chief Judge, United States District Court, District of Idaho.

[Endorsed]: Filed May 17, 1956.

[Title of District Court and Cause.]

No. 1876

MOTION IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Comes now the Plaintiff in the above-entitled action and moves that the Court deny the Defendant's Motion for Summary Judgment for the reason that questions of fact are raised by Defendant's own Motion, and in addition, other questions of fact are present, all of which must be decided on new trial in view of the Court's ruling that the matter as against Shell Oil Company shall be tried in its entirety.

This Motion is based upon the affidavits of Clarence Robinson, E. W. Windolph, and Glenn A. Coughlan made in support of Motion for New Trial heretofore filed in this action, and is further based upon all the records, files, and proceedings in this matter.

Dated this 16th day of May, 1956.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 21, 1956.

[Title of District Court and Cause.]

No. 1876-E-Civil

MINUTES OF THE COURT

May 21, 1956

This cause came on regularly this date in open court on defendant's Motion for a Summary Judgment, Motion to Postpone Trial, and plaintiff's Motion in Opposition to postponing the trial. Glenn A. Coughlan appeared on behalf of plaintiff and Claude Marcus for defendant. Upon Motion of Claude Marcus, Grant C. Aadnesen, Esquire, was admitted to practice at the bar of this court and was entered as associate counsel for defendant.

After hearing counsel for the respective parties, the Motion for Summary Judgment was denied; the Motion to Postpone the Trial was denied, and the Motion in Opposition was granted.

It was stipulated by and between counsel that it would not be necessary to empanel an alternate juror and that if any juror became incapacitated or unable to serve, a verdict of the remaining jurors would be binding.

[Title of District Court and Cause.]

No. 1876

NOTICE OF FILING OF DEPOSITION

To: Claude Marcus, Attorney for Defendant.

Sir: Please Take Notice that the Deposition of Dr. Rulon B. Lindsay, taken before Ray D. Bistline, a certified shorthand reporter and notary public in and for the County of Bannock, State of Idaho, has been duly certified to and returned to the Clerk of the United States District Court for the District of Idaho, and has been filed in the office of the Clerk.

Dated at Pocatello, Idaho, this 23rd day of May, 1956.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 23, 1956.

[Title of District Court and Cause.]

No. 1876

DEFENDANT'S REQUESTED INSTRUCTIONS

Shell Oil Company, defendant, respectfully requests, if in addition to the usual instructions given

by the court, Instructions Nos. 1 to 9, inclusive, herein contained.

HAWLEY & MARCUS,

By /s/ CLAUDE MARCUS,
Attorneys for Shell Oil Company.

Instruction No. 1

You are instructed that, as a matter of law, the contract between the Rocky Mountain Oil Corporation and Shell Oil Company created an independent contractor relationship and that Shell Oil Company is not liable for the negligence of an employee of Rocky Mountain Oil Corporation and therefore your verdict should be in favor of the defendant and against the plaintiff.

Instruction No. 2

You are instructed that the evidence in this case is insufficient to show liability on the part of defendant Shell Oil Company and therefore you are instructed and advised to return a verdict in this case for the defendant Shell Oil Company and against the plaintiff.

Instruction No. 3

You are instructed that natural persons or corporations have a right to enter into lawful contracts and if such contract creates the relationship of an independent contractor a contracting party is not liable for the negligence of the other party or the

negligence of employees, agents or servants of the other party.

Instruction No. 4

As I have earlier instructed you the contract between the Rocky Mountain Oil Corporation and the Shell Oil Company created the relationship of independent contractor and therefore Shell Oil Company is not responsible for the negligence of the Rocky Mountain Oil Corporation or of its employees. Before you may find against the defendant Shell Oil Company in this case you must find and determine from the evidence that Shell Oil Company had the right by separate agreement with the Rocky Mountain Oil Corporation and actually exercised control and supervision over said oil drilling at the very time that this accident occurred beyond and outside the terms of said contract and even should you find that at such time Shell Oil Company exercised and had the right to exercise control and supervision over such oil well drilling beyond and outside the terms of said contract you may not render a verdict against Shell Oil Company unless you further find that such control was so extensive as to amount to control over the method and means of performing such oil well drilling as well as control over the agencies and personnel employed in the performance of such work.

Instruction No. 5

Should you find that the Shell Oil Company exercised such control and supervision over the oil well

drilling outside and beyond the terms of the contract between Shell Oil Company and Rocky Mountain Oil Corporation as to make the Rocky Mountain Oil Corporation and its employees the servants and employees of Shell Oil Company before you can find a verdict against the defendant Shell Oil Company you must find and determine that such relationship existed between Rufus Doman and the Shell Oil Company at the particular time of the occurrence resulting in injury to the plaintiff and in respect to the very transaction out of which such injuries arose. Before you can find that said Rufus Doman was the servant or employee of the Shell Oil Company at such time you must find that Shell Oil Company had the right to exercise and was exercising control and supervision over said drilling work to the extent that I have outlined in other instructions.

Instruction No. 6

The defendant in this case has interposed the defense of contributory negligence on the part of the plaintiff. You are instructed that in the event you find the plaintiff was guilty of contributory negligence which contributed in any degree to the accident involved herein then your verdict should be for the defendant and against the plaintiff.

Instruction No. 7

Should you find that, at the time of the injury, the plaintiff was an employee of the Rocky Mountain Oil Corporation and that the person whose

negligence, if any, caused this accident was not an employee, agent or servant of the Shell Oil Company then your verdict should be in favor of the defendant and against the plaintiff.

Instruction No. 8

You are instructed as a matter of law that the contract between Shell Oil Company and Rocky Mountain Oil Corporation created an independent contractor relationship and that Shell Oil Company would not be responsible or liable for the negligence of an employee of Rocky Mountain Oil Corporation. In this case unless you find that the Shell Oil Company exercised control over said oil well drilling over and beyond the terms of said contract, your verdict should be for the defendant. Should you find that at such time Shell Oil Company exercised and had the right to exercise control and supervise all of such oil well drilling, over, beyond and exceeding the terms of said contract, you may not render a verdict against the defendant unless you find that such control was so extensive as to amount to control over the method and means of doing such oil well drilling and control over the agents and personnel employed therein and that the defendant was exercising such control and supervision beyond the terms of said contract at the very time that this accident occurred.

Instruction No. 9

You are instructed that Regulation 221.19 of the

U. S. Department of the Interior, Land Office, provides as follows:

In all cases where operations on a lease are not conducted by the record owner, but are to be conducted under authority of an operating agreement, an unapproved assignment, or other arrangement, a "designation of operator" shall be submitted to the supervisor, in a manner and form approved by the supervisor, prior to commencement of operations. If the designation of operator form cannot be obtained from the lessee without undue inconvenience to the operator, the supervisor in his discretion may accept in lieu thereof a valid operating agreement approved by the Secretary. A designation of operator will be accepted as authority of operator or his local representative to fulfill the obligations of the lessee and to sign, as operator, any papers or reports required under these oil and gas operating regulations. It will rest in the discretion of the supervisor to determine how a local representative of the operator empowered to act in whole or in part in his stead shall be identified.

If the designated operator shall at any time be incapacitated for duty or absent from his designated address, the operator or the lessee shall designate in writing a substitute to serve in his stead, and, in the absence of such operator or of notice of the appointment of a substitute, any employee of the lessee who is on the leased lands or the contractor or other person in charge of operations will be considered the agent of the lessee for the service

f orders or notices and service in person or by rdinary mail upon any such employee, contractor, r other person will be deemed service upon the perator and the lessee. All changes of address and ny termination of the operator's authority shall e immediately reported, in writing, to the supervisor or his representative. In case of such termiation or of controversy between the lessee and the esignated operator, the operator, if in possession f the leasehold will be required to protect the interests of the lessor.

You are instructed that the filing of such designation of operator under this Regulation would not onstitute such operator, general agent, for the parties executing such designation, but such designation ould be restricted to the matters therein contained.

[Endorsed]: Filed May 24, 1956.

Title of District Court and Cause.]

No. 1876-E—Civil

MINUTES OF THE COURT

May 24, 1956

This cause came on for trial before the Court and jury. Glenn A. Coughlan, Esquire, appearing for he plaintiff, and Claude Marcus and Grant C. adnesen appearing for the defendant. On motion f Glenn Coughlan, Esq., it was ordered that Milton

Zener, Esq., be entered as associate counsel for the plaintiff.

The Clerk, under direction of the Court, proceeded to draw from the jury box the names of twelve person, one at a time, written on separate slips of paper, to secure a jury. McKinley Jenkins and Harry L. Hops, whose names were so drawn, were excused on plaintiff's peremptory challenges; and Lenore Brownlee, Frank Michael and Mrs. Clyde Gravatt, whose names were also drawn, were excused on defendant's peremptory challenges.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified, and who were sworn to well and truly try said cause and a true verdict render, to wit:

1. John R. Williams
2. Rex Howard
3. Ilene Mehlhaff
4. Hugh L. Tuohy
5. Esther Balmforth
6. Cora Noble
7. Fred Deeg
8. Robah Glascock
9. Bud Kelly
10. Keith F. Adams
11. Clifford G. Merrill
12. Robert Barclay

It was stipulated by and between counsel for the respective parties that it would not be necessary to empanel an alternate juror and that if any of the

regular panel of twelve were absent for any reason, a verdict of the remaining jurors serving would be binding.

The jury was admonished by the Court and excused for a short time. During the absence of the jury, the defendant moved the Court for an Order dismissing this cause under Rule 41 of the Federal Rules of Civil Procedure. The motion was denied.

After a statement of plaintiff's cause by one of his counsel, Lanus Wayne Prestidge and Edmond W. Windolph were sworn and testified as witnesses and other evidence was introduced on the part of plaintiff.

Upon motion of Glenn Coughlan, Esq., the deposition of Rufus Doman was ordered published and the same was read into the record by Milton Zener reading the questions on direct examination and Claude Marcus the questions and Glenn Coughlan the answers on cross-examination.

The deposition of Dr. Rulon B. Lindsay was ordered published on motion of Glenn A. Coughlan and the same was read into the record by Milton Zener reading the questions and Glenn A. Coughlan the answers thereto.

After admonishing the jury, the Court excused them to 9:30 a.m., Friday, May 25, 1956, and further trial of the cause was continued to that time.

[Title of District Court and Cause.]

No. 1876

VERDICT

We, the jury in the above-entitled cause, find for the plaintiff, and against the defendant, Shell Oil Company, a corporation, and assess damages against the defendant, Shell Oil Company, a corporation, in the sum of $10,000.

/s/ KEITH F. ADAMS,
Foreman.

[Endorsed]: Filed May 25, 1956.

[Title of District Court and Cause.]

No. 1876-E—Civil

MINUTES OF THE COURT

May 25, 1956

This cause came on for further trial before the Court and jury; counsel for the respective parties being present, it was agreed that the jury panel was present.

Warren McIntyre was sworn and testified as a witness for the plaintiff.

Upon stipulation of counsel, it was Ordered that any Exhibit introduced and received in Cause No.

1875-E may be withdrawn and used in Cause No. 1876-E.

Comes now the plaintiff, in the absence of the jury, and moves the Court for an Order directing the Clerk to enter default against the defendant, Shell Oil Company, on the grounds and for the reason the defendant did not comply with Rules 36 and 37 of the Federal Rules of Civil Procedure. Motion denied.

At this time plaintiff's interrogatories propounded to the defendant and the answers thereto were read into the record by Milton Zener reading the questions and Glenn A. Coughlan the answers thereto.

Here plaintiff rests.

Plaintiff having rested, comes now the defendant, Shell Oil Company, and moved the Court for an Order dismissing this cause of action. The motion was denied by the Court without prejudice.

Here defendant rests and both sides close. Both sides having closed, comes now the defendant, Shell Oil Company, and moves the Court for an Order dismissing this cause. The motion was denied. Thereupon, defendant, Shell Oil Company, moved the Court for a directed verdict in favor of the defendant, Shell Oil Company, and against the plaintiff. The motion was denied.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury, and placed them in charge of

bailiffs duly sworn, and they retired to consider their verdict. While the jury was still out, the Marshal was directed to provide them with supper at the expense of the United States.

On the same day the jury returned into Court, counsel for the respective parties being present, whereupon the jury presented their written verdict, which was in the words following.

In the United States District Court for the District of Idaho, Eastern Division

No. 1876

LANUS WAYNE PRESTIDGE,

Plaintiff,

vs.

SHELL OIL COMPANY, a Corporation; ROCKY MOUNTAIN OIL CORPORATION, a Corporation, and STONY POINT DEVELOPMENT, INC., a Corporation.

Defendants.

JUDGMENT

This cause came on for trial before the Court and a jury on May 24, 1956, et seq., both parties appearing by counsel, and the issues having been duly tried and the jury having rendered a verdict for plaintiff and against the defendant, Shell Oil Company, a corporation, in the sum of $10,000.00,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff recover of defendant, Shell Oil Com-

pany, a corporation, the sum of $10,000.00, with interest at the rate of 6% per annum, and his costs of action, and that the plaintiff have execution therefor.

Dated this 28th day of May, 1956.

[Seal] /s/ ED M. BRYAN,
Clerk.

[Endorsed]: Filed May 28, 1956.

[Title of District Court and Cause.]

No. 1876

MOTION OF SHELL OIL COMPANY FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT, OR FOR NEW TRIAL

Shell Oil Company, defendant above named, moves the court to set aside the verdict of the jury herein and to set aside the judgment entered herein and to enter judgment in favor of this defendant in accordance with its motion to dismiss and motion for directed verdict duly made herein and if the foregoing motion be denied to set aside the verdict and the judgment herein and to grant defendant a new trial, said motions being made upon the following grounds and for the following reasons:

(a) That the court should have granted the motion to dismiss made by this defendant and

should have granted the motion for directed verdict made by this defendant at the close of the evidence for the reason that the evidence of plaintiff was insufficient to constitute a cause of action against this defendant and was insufficient as a matter of law upon which a verdict for a judgment against this defendant could be based.

(b) The error of the court in refusing to grant the motion to dismiss and motion for directed verdict of this defendant.

(c) Error of the court in failing to give the instructions requested by this court and especially in failing to instruct the jury as a matter of law with respect to the relationship of the Shell Oil Company and the Rocky Mountain Oil Corporation and the error of the court in submitting such questions to the jury.

(d) The error of the court in submitting a form of verdict to the jury with a caption containing the names of parties defendant in addition to that of this defendant.

(e) The error of the court in instructing the jury with reference to joint enterprise, principal and agent, and master and servant, the evidence being totally insufficient to show any such relationship between Shell Oil Company and the other named defendants.

(f) The error of the court in the admission and exclusion of evidence especially in material evidence

offered under the theory of control by Shell Oil Company.

(g) That the verdict of the jury herein is completely contrary to the evidence and that the jury disregarded the instructions given herein.

(h) That the verdict of the jury awarding damages to the plaintiff is grossly excessive and contrary to the evidence.

(i) That the verdict of the jury herein is against the weight of the evidence and excessive.

(j) The error of the court in allowing interrogatories and admissions and answers thereto read in evidence.

Upon these grounds and upon the records, files and proceedings herein this defendant moves the court to set aside the verdict of the jury and judgment herein and to enter judgment in favor of this defendant and if the foregoing motion be denied to set aside the verdict and judgment and then to grant a new trial herein.

These motions are made without prejudice to the disposition and determination of any and all pending motions or matters before this court.

/s/ CLAUDE MARCUS,
Attorney for Shell Oil Company.

Receipt of copy acknowledged.

[Endorsed]: Filed May 31, 1956.

[Title of District Court and Cause.]

No. 1876

NOTICE OF TIME AND PLACE OF TAXATION OF COSTS

To Claude V. Marcus, Attorney for Defendant, Shell Oil Company:

Please take notice that the bill of costs, a copy of which is attached hereto, will be presented to the Clerk of the above court for taxation at his office in the United States Courthouse at Boise, Idaho, on the 7th day of June, 1956, at 10:00 o'clock in the morning of that day.

Dated this 1st day of June, 1956.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

[Title of District Court and Cause.]

No. 1876

MEMORANDUM OF COSTS

Disbursed by plaintiff, Lanus Wayne Prestidge:

Filing fee	$ 15.00
Service, U. S. Marshal	2.00
Service of subpoenas	1.10
Service by Sheriff of Bear Lake Co.	1.40
Attorneys docket fee	20.00
	$ 39.50

Witness Fees:

Dr. R. B. Lindsay, Montpelier, Ida. (First trial):	
1 day's attendance	4.00
1 day's subsistence	....
200 miles at 7c per mile	14.00
Dr. R. B. Lindsay—Deposition (Second trial)	30.00
Edmond Windolph	
2 days' attendance	8.00
2 days' subsistence	10.00
200 miles at 7c per mile	14.00
Loren McIntyre	
2 days' attendance	8.00
2 days' subsistence	10.00
2 miles at 7c per mile	.14
John Gamble	
2 days' attendance	8.00
2 days' subsistence	10.00
2 miles at 7c per mile	.14
	$121.28
Total	$160.78

Costs taxed this 7th day of June, 1956, in the amount of $137.64.

/s/ ED M. BRYAN,
Clerk.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed June 1, 1956.

[Title of District Court and Cause.]

No. 1876-E—Civil

MINUTES OF THE COURT

July 26, 1956

This cause came on regularly this date in open court for hearing on Defendant's Motion for Judgment in Accordance with Motion for Directed Verdict, or for New Trial—Glenn A. Coughlan, Esquire, appearing as counsel for the Plaintiff; Claude Marcus and Grant C. Aadnesen appearing on behalf of Defendant.

After hearing counsel for the respective parties and being fully informed, the Court denied the Motion for Judgment in Accordance with Motion for Directed Verdict or for New Trial.

[Title of District Court and Cause.]

No. 1876

NOTICE OF APPEAL

Notice Is Hereby Given that Shell Oil Company, a corporation, a defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain final order denying the motion for directed verdict or for new trial of this defendant made and entered in this action on July 26, 1956.

Dated August 23rd, 1956.

/s/ CLAUDE MARCUS,

/s/ BLAINE F. EVANS,

/s/ GRANT C. AADNESEN,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 23, 1956.

[Title of District Court and Cause.]

No. 1876

UNDERTAKING ON APPEAL

Know All Men by These Presents:

Whereas, Shell Oil Company, a corporation, is appealing to the United States Court of Appeals for the Ninth Circuit from that certain order and judgment denying judgment in accordance with motion for directed verdict or for new trial of the said Shell Oil Company, said order made and entered in the above-entitled action July 26, 1956, and

Whereas, the said appellant desires to give an undertaking on appeal for costs that may be awarded against it on said appeal,

Now Therefore, in consideration of the premises and of such appeal the undersigned, American Automobile Insurance Company, a corporation, duly licensed and authorized to transact business in the

State of Idaho, and authorized to give such undertaking on appeal to become sole surety on undertaking in judicial proceedings does hereby undertake and promise on the part of the said Shell Oil Company, a corporation, that said Shell Oil Company, a corporation, will pay all costs which may be awarded against it on said appeal or on dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars ($250.00) which amount the said American Automobile Insurance Company acknowledges itself to be firmly bound by these presents.

In Witness Whereof, the said American Automobile Insurance Company has caused its name to be hereunto subscribed and its corporate seal affixed by its duly authorized officer this ..... day of August, 1956.

[Seal] AMERICAN AUTOMOBILE INSURANCE COMPANY,
Surety;

By /s/ L. W. RAEDER,
Attorney-in-Fact.

Countersigned by:

RAEDER, VAN DEUSEN & LINK AGENCY;

By /s/ L. W. RAEDER,
Resident Agent.

[Endorsed]: Filed August 23, 1956.

[Title of District Court and Cause.]

No. 1876

MOTION FOR ORDER EXTENDING TIME TO FILE RECORD AND DOCKET CAUSE

The appellant herein moves the court for an order extending the time to file the record on appeal and docket the cause in the appellate court to and including the 21st day of November, 1956, upon the ground that the Notice of Appeal was filed on the 23rd day of August, 1956; that forty (40) days from that date have not yet elapsed and that because of the necessity of obtaining a transcript of the testimony herein and because said transcript has not yet been completed, additional time is necessary to properly prepare the record for the appellate court.

Dated September 28, 1956.

/s/ CLAUDE MARCUS,
Attorney for Appellant.

[Endorsed]: Filed September 28, 1956.

[Title of District Court and Cause.]

No. 1876

ORDER EXTENDING TIME TO FILE RECORD AND DOCKET CAUSE

Upon motion of appellant and good cause appearing therefor,

It Is Ordered that the time within which to file the record and docket the above-entitled cause in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including the 21st day of November, 1956.

Dated October 1, 1956.

/s/ FRED M. TAYLOR,
District Judge.

[Endorsed]: Filed October 1, 1956.

In the United States District Court for the District of Idaho, Eastern Division

No. 1876

LANUS WAYNE PRESTIDGE,

Plaintiff.

vs.

SHELL OIL COMPANY, a Corporation; ROCKY MOUNTAIN OIL CORPORATION, a Corporation, and STONY POINT DEVELOPMENT, INC., a Corporation,

Defendants.

REPORTER'S TRANSCRIPT

This matter was tried before the Honorable Fred M. Taylor, United States District Judge for the District of Idaho, sitting with a jury, at Pocatello, Idaho, May 24, 1956.

Appearances:

Plaintiff:
GLENN C. COUGHLAN,
MILTON ZENER.

Defendant Shell Oil Company:
CLAUDE MARCUS,
GRANT C. AADNESEN.

(Jury duly selected.)

The Court: You may make your opening statement.

Mr. Coughlan: If it please the Court, counsel, and ladies and gentlemen, it is now my privilege to discuss with you what we expect to prove and what this case is all about. The evidence will show that a man by the name of Ragnar Barhang obtained an oil lease to acreage in Bear Lake County, Idaho, in the year of 1952; that subsequent to this Mr. Barhang assigned this lease to the Shell Oil Company and then the Shell Oil Company assigned a portion of the lease to a firm of well drillers by the name of Wheeler and Gray with the consent—I should say Shell assigned to Wheeler and Gray and made a contract with Wheeler and Gray to drill a test well on this acreage. Subsequently the Wheeler and Gray drilling firm assigned their contract to Rocky Mountain Oil Corporation, a drilling firm, with the consent of Shell Oil Company, and then Shell Oil Company made a partial assignment of the land to Rocky Mountain providing that certain things would be done as to tests that would be made

for Shell Oil Company whenever they asked; that they had the right to have their geologist on the premises and that in the event there was oil produced that Shell would have 12½ per cent of the production, a certain percentage of the gas if [2*] there was gas, and in the event it was a dry hole that Shell Oil Company would contribute up to $8,250 payment for the drilling. The evidence will also show that Shell Oil Company located the well as to where it was to be drilled, and the evidence will reveal that this well is surrounded by land which was retained by Shell Oil Company, and then they also agreed to assign to Rocky Mountain Oil Company acreage amounting to 2600 acres in this same area, blocked in what they refer to I believe as a checkerboard arrangement. In other words, they would have one section and Shell would have a section and Rocky Mountain would have a section. That is a portion of land, I don't mean a whole section of land. Now then Rocky Mountain proceeded to commence the drilling; however, before this drilling on or about July 20, 1953, Shell Oil Company filed with the Department of Land Management an instrument in which they designated Rocky Mountain Oil Company as their agent and operator. The operation was commenced and they drilled approximately to a place around a thousand feet and then they sent—the Shell Oil Company sent a geologist to the premises by the name of McIntyre. Mr. McIntyre arrived in Mont-

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

pelier about the 30th of May, I believe, and the 31st or 1st of June went out to the premises. They were not working at [3] that time, and then on the 2nd of June went back to the premises and was there when the occurrence happened which we are concerned with here. My client, the plaintiff, Mr. Prestidge, on the 1st of June, along with another man by the name of Wuthrick, contacted in the hotel a Mr. Robinson, who was the driller at Rocky Mountain, with respect to employment. Mr. Robinson advised them that they were to come to the site the next morning and he would see if there was any position for them. They did go to the site the next morning, arriving there about 7:00 or 7:30, and Mr. Robinson was asleep in a truck and so they waited around and they had a fire at the oil well site, which was in a five-gallon can with the top cut out and there was waste or some material in there and that was burning. They were standing around this fire and a man by the name of Doman, one of the employees of Rocky Mountain, took a quart can filled presumably with diesel and poured it on this fire to replenish the fire and the fire burned for a little while and then he took a large five-gallon can containing diesel with a spout, and at that time I believe the evidence will show that Mr. Prestidge was standing in the—to the rear of Mr. Doman, several steps back, and the evidence will show without question, I believe, that this fire was blazing and notwithstanding that Mr. Doman poured the oil from this large can on to the fire, resulting in an immediate explosion which whirled him around, and

the effect being that he threw the burning oil on Mr. Prestidge. Mr. Prestidge then made an effort to extinguish the flames and I believe Mr. Doman threw him to the ground and rolled him around on the ground and extinguished the flames, but before this could be done he had received severe burns on his legs, from his waist down; on his wrists and hands and on his face. I believe the evidence will show that these burns, at least on the legs, were of third degree. They immediately placed Mr. Prestidge in an automobile and rushed him to the hospital, where he was attended by a Doctor "Lindsey." The treatment required cleaning of these wounds, and of course Mr. Prestidge, I think the evidence will show, was in extreme shock. It required him to remain in the hospital for a period of 44 days, resulting of course in a large hospital and doctor bill. This procedure of treatment required dressings and cleansing of the wounds, and required Mr. Prestidge to be flat on his back. He couldn't move and had all of the attendant extreme pain that would result from such a serious occurrence. Then Mr. Prestidge left the hospital and was required to convalesce for a period of time, as a result of this occurrence he has difficulty now with circulation. Of course, the skin breaks [5] easily when he strikes it. He has pain in his legs. He has limitation of motion which will remain permanently with him. The evidence we will show will establish that Rocky Mountain and Shell Oil Company were engaged in this enterprise as a joint

venture, and that Rocky Mountain was the agent of Shell Oil Company, and of course as we contend Shell is responsible for this occurrence. I believe that that in general covers the situation so far as we are concerned.

Mr. Marcus: Your Honor, may we present a matter?

The Court: Yes. I will excuse the jury first. Ladies and Gentlemen of the Jury: We will now take a brief recess. It will be your duty during this recess and all recesses or adjournments during the course of this trial, not to discuss the trial, or any matter pertaining to the trial among yourselves as members of the jury, or with anyone else, and it will be your duty not to allow anyone to discuss it in your presence. If anyone mentions any matter connected with this trial in your presence or to you, you will tell them that you are a member of the jury and that they should not discuss it, and if they insist on their discussion, you will report them to the Court. You will understand that the reason for this is that the jury should hear all the evidence in the case, the argument of counsel and the instructions of the Court, free from any outside influence. You will remember [6] this admonition so that it will not be necessary for me to take up your time in repeating it at each adjournment.

(Jury retired.)

The Court: You may proceed.

Mr. Marcus: Your Honor, as we discussed yesterday we would like to maintain our record in this

case identical to that in the previous Wuthrick case, and at the same points in the trial of this case we would like to show identical motions and merely let the reporter copy all the motions and grounds at those points if that is agreeable with counsel.

Mr. Coughlan: I have no objection to that.

The Court: The record may show the same motions made at the same points as were made in the former case, and the same ruling of the Court.

Mr. Marcus: At this time the defendant Shell Oil Company moves the dismissal of the action by the plaintiff herein under Rule 41 (b) of the Rules of Civil Procedure on the ground and for the reason, your Honor, that the opening statement of counsel shows non-liability on the part of the defendant. His statement of the facts indicated that this well was being drilled under contract between the Rocky Mountain Company and the Shell Oil Company, and that the negligence, if any, in this case was that of an employee of the Rocky Mountain Oil Corporation. On the basis of his statement of facts which shows [7] non-liability I move the dismissal of the action.

The Court: The motion will be denied. We will take a short recess. [8]

LANUS WAYNE PRESTIDGE

the plaintiff herein, called as a witness, being first duly sworn, testified as follows, upon

Direct Examination

By Mr. Coughlan:

Q. Will you state your name, please?

A. Lanus Wayne Prestidge.

Q. Where did you reside on or about the 2nd of June, 1954? A. Montpelier, Idaho.

Q. How long had you been residing there?

A. Well, I would say close to a year or something like that.

Q. Speak right up so the jury can hear you. What is your age? A. I am 22 now.

Q. Are you married? A. I am.

Q. Do you have any children?

A. No, sir, I don't.

Q. Now calling your attention to the first part of June of 1954 did you inquire of someone concerning employment? A. Yes, sir, I did.

Q. Who was that? A. Mr. Robinson.

Q. And where?

A. That was at the Burgoyne Hotel at Montpelier.

Q. Do you know what Mr. Robinson did? [9]

A. Well, he was some sort of boss out there at the drilling rig.

Q. What kind of employment were you asking for?

(Testimony of Lanus Wayne Prestidge.)

A. Well, roughneck, anything that pertained to the drilling out there.

Q. What did Mr. Robinson tell you at that time?

A. He said at that time that the rig was broken down and for us to come out early the next morning, and if it was in operation there might be a place for us to work.

Q. And then did you go out the next day?

A. Yes, sir, I did.

Q. And what day was that as you recall?

A. It was about June 2nd, somewhere in there.

Q. Could it have been the first of June?

A. Possibly could, I couldn't say for sure.

Q. And where was that rig located from Montpelier?

A. It was about 12 or 15 miles northeast of Highway 89, and then you turn left and it is about three miles back on another road.

Q. What time did you arrive at the rig?

A. Somewhere between 7:00 and 7:30.

Q. After you arrived there what did you observe?

A. Well, we got there and Mr. Robinson was asleep in the truck, so we thought we would wait on him. You know, wait until he got up, and they had a can of diesel—can of fire there— [10] some kind of fire over there—bunch of guys was around, and we thought we would go over and warm and wait for him to get up.

Q. Please describe the premises.

A. Well, the rig set down between two moun-

(Testimony of Lanus Wayne Prestidge.)

tains where it came together in kind of a horseshoe and slush pit was kinda on the side, and the water was right on the northwest side, and the engines was on the due south.

Q. Describe this fire, if you will?

A. Well, it was in a five-gallon can with the top cut out of it.

Q. Was there anything inside of the can?

A. I think so, sir, I am not sure.

Q. How far away from this fire was the rig?

A. Roughly I would say about 10, 15, maybe 20 foot.

Q. Now what occurred then?

A. We went over to the fire like I say to warm, and the fire kinda burned down and this Mr. Doman took a small can, I believe it was a quart can, and said "We might as well build it up a little bit," and at that time I moved away kinda to his rear and kinda turned my back to him.

Q. And what did Mr. Doman do then?

A. Well, I couldn't say for sure. I think he took a five-gallon can——

Mr. Marcus: Your Honor, we object to this testimony. He indicated he didn't know by saying he wasn't sure. [11]

The Court: Objection sustained. He may only testify as to what he knows and what he saw.

Q. What was the next thing you observed, Mr. Prestidge?

A. Only thing I know is that I heard kinda a boom and swoosh sound, and must have kinda

(Testimony of Lanus Wayne Prestidge.)

turned and a big ball of fire hit me right in the face.

Q. Where were you then?

A. Best I remember I was coming to Mr. Doman's rear.

Q. Do you know how far away from the fire you were?

A. I was approximately six or eight steps, something like that.

Q. Did Mr. Doman have anything in his hands at that time?

A. You mean when I got caught on fire?

Q. Yes.

A. Well, I couldn't say because all I remember is just that big ball of fire hitting me and kinda hard to say. I think he had something in his hands. I don't know for sure.

Q. Now who was Mr. Doman, do you know?

A. I understood he was an employee of Rocky Mountain Oil Company.

Q. And was there anyone else there?

A. There was quite a few gentlemen standing around.

Q. Was someone with you that morning?

A. Not that I recall.

Q. Did someone go to the rig with you?

A. Yes, Mr. Wuthrick. [12]

Q. When you heard this boom and swoosh, what happened to you then?

A. Well, I was on fire and I was trying to put the fire out, and I really don't know for sure what did happen then.

(Testimony of Lanus Wayne Prestidge.)

Q. Did anything happen to any part of your body then?

A. Yes, sir, I was burned from the waist down, and around the face and around the wrists.

Q. Now this explosion, did that occur when he poured the oil out of the can on the fire?

A. Yes, sir, I think so.

Q. What was done with you?

A. Well, they put me in a car and took me to Montpelier to the hospital.

Q. How long did you remain in the hospital?

A. I think it was 44 days.

Q. Were you attended by any doctor?

A. Yes, sir, I was attended by Doctor Lindsay.

Q. And what treatment did Doctor Lindsay give you?

A. Well, when we first got there he put some sort of ointment on the burns and wrapped it with a heavy gauze and bandage and gave us some kind of shots, I don't know what they were.

Q. Did you see your legs at that time?

A. At the time they were putting the ointment on?

Q. Yes. [13]

A. No, sir, not too closely, I was——

Q. Did they change these dressings while you were in the hospital?

A. Yes, sir, they changed them about every three or four days.

Q. How did your legs feel, were they painful?

A. Yes, sir, they were quite painful. They had

(Testimony of Lanus Wayne Prestidge.)

a terrible burning all the time. It is hard to describe just what they felt like. The best way to describe is it was just like taking a blow torch and gradually melting off the flesh off of you.

Q. What about your hands and face, how did they feel?

A. Well, it was a burning, hurting, feeling all the time.

Q. And did they treat your hands and face also?

A. Yes, sir, they did.

Q. What was involved when they changed your dressings, Mr. Prestidge?

A. Well, I was in a private room and Doctor Lindsay and about three or four nurses would come in there and two of them would come up and hold my head and two of—that is hold my head and hands down where I couldn't raise up, and one or two nurses would help Doctor Lindsay, and they would have to clip the bandages down through there and just peel them off, just be like peeling a potato or something, taking the hide right off.

Q. Did that cause you any pain? [14]

A. Tremendous pain.

Q. And what about narcotics; did you receive any narcotics? A. Yes, sir, I did.

Q. And do you know how often?

A. Not for sure, sir, it was quite frequent, though.

Q. Were those by means of injection?

A. Yes, sir.

Q. Needles? A. Yes, sir.

(Testimony of Lanus Wayne Prestidge.)

Q. Now during the time you were in the hospital did you observe your legs while the dressings were off? A. At one time, I did, sir.

Q. What was their appearances?

A. Well, they were real small, about like a match stick—I mean something like that, and all shriveled up, and they just looked terrible.

Q. Remember to speak up so they can all hear you. Was there any odor connected with your legs?

A. Yes, sir, there was a lot of odor connected with it.

Q. What did that smell like?

A. Well, on burns you have to let the burned flesh decay off, and if you ever smelled decaying flesh or anything like that you know what it is then.

Q. What position did you maintain while you were in the hospital?

A. Most of the time I was flat on my back. [15]

Q. Mr. Prestidge, would you kindly stand up and raise your trousers and show your legs to the Court and jury?

A. (Witness did as requested.)

Q. Now are those scars on your legs the result of these burns? A. Yes, sir, they are.

Q. And what did you do after you got out of the hospital?

A. Well, I had to go home and stay there for quite a while, and then go and see the doctor every day for a while and then it was every other day.

Q. What treatment was he giving you during that time?

(Testimony of Lanus Wayne Prestidge.)

A. He kept putting this ointment on my legs all the time and checking them all the time.

Q. Have you had any difficulty with your legs since you got out of the hospital?

A. Yes, sir, I have.

Q. What was that?

A. Well, they are stiff. I sit in one position too long they get stiff on me, and I just hit them the wrong way or something they break open and they are hard to heal, and I can't run like I used to could. Only thing I can do is trot or walk fast. I don't have the same movements I used to have.

Q. How about bending your knees or squatting down?

A. I can't squat down like I used to be able to do.

Q. Have you had any difficulty in securing employment as a result of these burns? [16]

A. Yes, sir.

Mr. Marcus: Move to strike that for the purpose of an objection.

The Court: It may be stricken for the purpose of your objection.

Mr. Marcus: Object to it as calling for a conclusion, leading and suggestive.

The Court: He may answer.

A. Yes, sir, I have.

Q. Explain about that, please?

A. Well, I went to one up in Houston and I was turned down. They said on account something

(Testimony of Lanus Wayne Prestidge.)

might come up later. They looked at my leg and they said they couldn't possibly hire me.

Mr. Marcus: Move to strike that for the purpose of an objection.

The Court: It may be stricken.

Mr. Marcus: Object to the answer on the ground it is a conclusion, and that it is hearsay.

The Court: Objection overruled.

Mr. Coughlan: May the answer be reinstated, your Honor?

The Court: Yes.

Q. Who looked at your legs at this time you are referring to?

A. The gentleman there at the automatic gun company in Houston. [17]

Q. Did any doctor look at your legs?

A. It was a doctor of the company, a company doctor.

Q. Do you know anything about your legs during the change of the weather?

A. Yes, sir, I do, extreme cold weather they bother me a lot, and if it is too hot they bother me. They get dry in the joints and knees. They hurt a lot and ache, and if it starts to rain I can usually tell when it is going to rain or something like that.

Q. Do you notice anything about your legs when it is cold?

A. Yes, sir, it has a tingling, hurting feeling in it, aching.

Q. What was that last?

(Testimony of Lanus Wayne Prestidge.)

A. It has aching in the joints and things like that.

Q. Try and speak up as much as you can, Mr. Prestidge. Have you been submitted bills for your treatment in the hospital by the doctor?

A. Yes, sir, I have.

Q. Handing you Plaintiff's Exhibit 1, I will ask you if you have seen that before?

A. Yes, sir.

Q. And what is that?

A. That is a bill from Doctor R. B. Lindsay.

Q. Is that in connection with treatment for your legs? [18] A. Yes, sir.

Q. What is the amount of that bill?

Mr. Marcus: It has not been admitted in evidence as yet.

The Court: No, it has not.

Q. Will you examine Plaintiff's Exhibit 2?

A. (Witness did as requested.)

Q. What is that?

A. That is a bill from Bear Lake Memorial Hospital.

Q. And is that in connection with the time you were in the hospital for these burns?

A. Yes, sir, it was.

Mr. Coughlan: I offer in evidence Exhibits 1 and 2.

Mr. Marcus: Object to these offered exhibits on the ground of insufficient identification.

The Court: Objection overruled, they may be admitted.

(Testimony of Lanus Wayne Prestidge.)

Q. What is the amount of the bill from Doctor Lindsay, being Plaintiff's Exhibit 1?

A. $316.00.

Q. And what is the amount of the hospital bill, being Exhibit No. 2? A. $592.85.

Q. And have these bills been paid?

A. No, sir.

Q. Mr. Prestidge, following these burns were you unconscious [19] at any time?

A. Yes, sir, I think so.

Q. Was that immediately following the incident or when was that?

A. No, sir, I remember everything—going to the hospital and everything like that.

Q. That was after you got in the hospital?

A. Yes, sir.

Q. Handing you Plaintiff's Exhibits 3, 4 and 5; will you examine those and tell me what they are?

A. Yes, sir, they are pictures of my legs.

Q. And when were those taken?

A. Somewhere in January, 1955.

Q. Where were they taken?

A. Montpelier, Idaho.

Q. And do you know by whom?

A. No, sir, I don't know the gentleman.

Q. Do they accurately portray the appearance of your legs at that time? A. Yes, sir.

Mr. Coughlan: We offer for purposes of illustration Plaintiff's Exhibits 3, 4 and 5.

Mr. Marcus: May I ask some questions in aid of an objection?

(Testimony of Lanus Wayne Prestidge.)

The Court: Yes. [20]

Q. (By Mr. Marcus): Mr. Prestidge, you do remember who took those pictures?

A. No, sir, I don't remember the gentleman's name.

Q. Of course you didn't take them, did you?

A. No, sir, I didn't.

Q. At whose request were the pictures taken?

A. I believe Mr. Coughlan's request.

Q. And was it some photographer in Montpelier?

A. Yes, sir, I believe so.

Mr. Marcus: Your Honor, we object to these pictures on the ground of not being able to examine the party who was taking them, and on the ground that they are incompetent, irrelevant and immaterial.

The Court: May be admitted for illustrative purposes only.

Mr. Coughlan: May they be handed to the jury?

The Court: They may.

(Exhibits 3, 4 and 5 handed to the jury.)

Cross-Examination

By Mr. Marcus:

Q. Mr. Prestidge, where do you presently reside? A. At Kemah, Texas.

Q. How long have you lived there?

A. Off and on all my life.

Q. Was that your residence at the time you were up at Montpelier? [21]

(Testimony of Lanus Wayne Prestidge.)

A. No, sir, I was living at Montpelier at the time.

Q. How long did you reside in that community?

A. Well, right at a year, I would say. I couldn't say for sure.

Q. You think then your residence has been Texas?

A. Well, Texas, Wyoming, Louisiana.

Q. What type of work have you followed and done since this occurrence?

A. Well, I went to work for Murray Rubber Company, molded rubber for oil field purposes, and things like that, and left there and come up here. I went back and worked a few days, and there was a lot of heat in there bothering my legs, and I got a chance to go to work at Sears-Roebuck and I went to work for them.

Q. How long did you work for them?

A. For Sears?

Q. Yes. A. About seven months.

Q. What type of work were you doing for Sears? A. I was a salesman.

Q. Was that a salesman on the floor of the store?

A. Yes, sir.

Q. What work did you do after that?

A. Well, I went to Louisiana on a job and I worked down there for A. R. "Siley." He was a labor foreman. [22]

Q. How long were you on that job?

A. About three weeks.

Q. What type of work was that?

(Testimony of Lanus Wayne Prestidge.)

A. Different types of work, contract construction work and things like that.

Q. Did that involve moving around quite a bit, what were your duties in connection with that work?

A. I was there to make sure the other men were on the job, kept time and books and things like that.

Q. Are you with them at the present time?

A. Left them to come up here on this case.

Q. You are presently employed with that same company?

A. Well, I wouldn't say I was presently employed. I probably could go back and get a job with them.

Q. You have terminated your job with them?

A. I told them I had to come up here, drew my pay and come up.

Q. What types of work did you follow prior to the time of this occurrence?

A. Well, I worked for—you mean before this accident?

Q. Yes.

A. I was in construction and some oil field work, and things like that.

Q. Any other types of work you followed?

A. Well, in the Navy.

Q. I didn't get that. [23]

A. I was in the Navy.

Q. And other than that you have followed construction work? A. Yes, sir.

Q. And those were the only types of work you followed prior to the time of this occurrence?

(Testimony of Lanus Wayne Prestidge.)

A. Yes, sir.

Q. And since that time you have in general followed the same type of work you did before?

A. No, sir, I spent most of my time since then with Sears-Roebuck.

Q. You say that prior to the time you went out to this site where this accident took place you contacted Mr. Robinson? A. Yes, sir.

Q. Did you contact anyone else with reference to work out there?

A. I think Mr. Windolph was with him at the time.

Q. There was Robinson and Mr. Windolph?

A. I think so, I am not sure.

Q. Who were those two men working for?

A. I really couldn't say. I understood they were the bosses on the rig out there.

Q. You say you don't know at this time, or didn't at that time know who they were working for?

A. No, I couldn't say. I understood they were the bosses out there for Rocky Mountain Oil Company or something. [24]

Q. You recall testifying in a previous trial of this action; do you not? A. Yes, sir.

Q. Do you recall a question to this effect: "Who did you contact?" Your answer was, "I contacted Mr. Robinson and Mr. Windolph." Question—"Do you know who those men were?" Answer—"Yes, they were employees of the Rocky Mountain Oil Company." Was that your answers at that time?

(Testimony of Lanus Wayne Prestidge.)

A. It must have been, sir, yes.

Q. And at that time you did know who these men were working for, did you?

A. Well, like I say, I thought they were working for Rocky Mountain Oil Company. I am pretty sure they were.

Q. Was that the company that was carrying on the drilling operations out there, Mr. Prestidge?

A. So far as I know it is, yes.

Q. And you were aware of that at the time you contacted these men and at the time you went out to the drill site? A. Yes, sir.

Q. Had you at any time prior to that time contacted the Shell Oil Company with reference to employment? A. No.

Q. You and Mr. Wuthrick drove out to where the well was being drilled, at about what time did you go out there that morning?

A. About 7:00 or 7:30, somewhere in there. [25]

Q. Did you drive out with him in his car?

A. Yes, sir, I rode out with him.

Q. Will you tell us again where the drill site was located?

A. It was about 12 or 15 miles northeast of Montpelier, Idaho, and you turn left about three miles off the road.

Q. You say you turned left off the public road?

A. Off Highway 89, yes, sir.

Q. How did you get up to the drill site from the public road?

A. Followed a road up through there by car.

(Testimony of Lanus Wayne Prestidge.)

Q. Was that just a temporary road that had been built there by this—by those people who were drilling the well?

A. I can't say who it was built for.

Q. Did that road extend on beyond the drill site?

A. I didn't notice, sir.

Q. And you and Mr. Wuthrick arrived up there you say about 7:30 in the morning?

A. Between 7:00 and 7:30, somewhere in there.

Q. What was the weather like at that time?

A. It was quite cold and still had a little frost and stuff around there.

Q. That was the reason they had this fire up there at the drill site, was it? A. Yes, sir. [26]

Q. So the men could keep warm, is that what they were using it for? A. Yes, sir.

Q. Where did you park your car with reference to the place where the fire was burning?

A. Well, it was quite a way from it. That would be hard to judge the exact distance how far it was.

Q. Where was the fire burning with reference to their tool house, or buildings they were using there at the site?

A. I don't remember the tool house, sir.

Q. Was there some building there that the men were using? A. I don't remember of any, sir.

Q. Where was the fire with reference to where you say Mr. Robinson's car was located?

A. His car—the truck he was in was north of the fire, where the fire was at.

Q. About how far from the fire was his car?

(Testimony of Lanus Wayne Prestidge.)

A. I don't know, 25 or 30 yards, something like that.

Q. Did you and Mr. Wuthrick then proceed to walk up to the fire? A. Yes, sir.

Q. How were you and he dressed at that time?

A. Well, had on khaki trousers and shirt, jacket and cap.

Q. And did you approach the fire and stand around it to keep warm? [27] A. Yes, sir.

Q. It was cold enough to be uncomfortable unless you were near a fire or some place with heat?

A. Yes, sir.

Q. And the reason you approached it and went up to the fire was to stand around there and get warm? A. That is right, sir.

Q. You didn't go up there to interview any of these representatives or employees of the Rocky Mountain Oil Corporation with respect to work?

A. No, sir.

Q. Now on what side of the fire did you stand when you first approached it?

A. Well, I can't say for sure. We moved around, it would be hard to say what side of the fire I was on.

Q. How long were you up there near the fire before the accident occurred?

A. We must have been up there half an hour or so, maybe a little longer. I really couldn't say.

Q. And you remained there continuously, did you, from the time you approached the fire you stood around there until this occurrence; is that

(Testimony of Lanus Wayne Prestidge.)

right? A. Around there somewhere, yes, sir.

Q. What were the other people around there?

A. I don't recall their names. There were a few other gentlemen around there. I do recall one of them called "Shorty" [28] and that is all I know.

Q. Now you observed Mr. Doman pick up the small can? A. Yes, sir.

Q. And apply some fuel to the fire?

A. Yes, sir.

Q. Where were you at that time?

A. I think I was coming to his left and when he picked up the small can I walked away back to the rear of him.

Q. And did you remain there until he applied the oil from the other can?

A. To the best of my knowledge I did, yes, sir.

Q. How much later was that after he did it the first time?

A. I couldn't say for sure. It wasn't too long though.

Q. A matter of a few minutes?

A. Something like that, just a little while.

Q. Did you actually see him pick up the can the second time?

A. No, sir, I didn't actually see him pick up the can, no.

Q. Had you turned your back to him before that time?

A. I about half way had my back toward him, yes, sir.

(Testimony of Lanus Wayne Prestidge.)

Q. Which way were you turned when he picked up the can the second time?

A. I couldn't actually say. I must have had my back to him or something like that. [29]

Q. Where was Mr. Wuthrick at that time?

A. I couldn't say where he was at that time.

Q. Isn't it a fact that you and Mr. Wuthrick had walked around and were on the opposite side of the fire at the time of this occurrence?

A. No, sir, not that I know of.

Q. You say not that you know of?

A. No, sir, to the best I remember I was standing to the rear of Mr. Doman.

Q. How far behind him were you?

A. Well, I would roughly say six or eight, maybe ten steps.

Q. And the first you observed was the fire that you say hit you? A. Yes, sir.

Q. Had you turned around prior to the time it hit you?

A. You mean before I got caught on fire?

Q. Yes.

A. When I walked away from him, no, sir. After I walked from him I didn't turn around until I heard the boom and swoosh sound. I must have tried to spin around or something and I seen a big ball of fire coming.

Q. You don't know where Mr. Wuthrick was standing at that time?

A. Not for sure, no, sir, I don't. [30]

Q. Did you object at any time to Mr. Doman, the

(Testimony of Lanus Wayne Prestidge.)

employee of the Rocky Mountain Company, pouring oil on the fire? A. No, sir.

Q. I believe in this case you have alleged that this occurrence took place on June 2nd?

A. Well, June 2nd, somewhere in there. I couldn't really say.

Q. As a matter of fact, Mr. Prestidge, the doctor bill showed you were first treated June 1st; is that right? A. It says 6/1/54.

Q. And with refreshing your mind with that reference you know now that the occurrence actually took place June 1st; is that correct?

A. It has been some time ago, sir, I couldn't say exactly what date it was.

Q. When were you finally released from the doctor's care, Mr. Prestidge?

A. Well, I don't know. I was released 7/15/54 from the hospital, and then I had to go see him after that.

Q. Is that the total bill for the doctor?

A. Yes, sir.

Q. Does that show the date of his last treatment?

A. No, sir, just shows when I was released from the hospital.

Q. Do you have any recollection of your own as to when you were released from his care? [31]

A. No, sir, not for sure.

Q. About how long was it after you were released from the hospital?

A. It was a couple or three weeks, somewhere in there.

(Testimony of Lanus Wayne Prestidge.)

Q. When was the first time that you started to work after being released?

A. Well, about two or three weeks later I went to work here at Lava. I went to see the doctor and I went to work as a bartender for Mr. Smith. The doctor said I could work inside but strictly no outside work whatever because I still had open places on my legs.

Q. That was about two weeks after you——

A. Somewhere in that neighborhood, yes, sir.

Q. So you did this work in addition to the work you first described to us? A. Yes, sir.

Q. How long did you do that kind of work?

A. Well, I was there a couple of months, something like that.

Q. And then you quit, did you, and returned to Montpelier?

A. I went to work for "Wisefield" as a salesman.

Q. I didn't get the name of that company.

A. "Wisefield."

Q. What type of work were you doing for them?

A. I was selling.

Q. How long did you do that work? [32]

A. I was there about a month or something like that.

Q. Was that at Montpelier?

A. No, sir, throughout Oregon and Idaho.

Q. You were travelling during that time?

A. Yes, sir.

Q. Driving your own car? A. Yes, sir.

The Court: I think we will recess until 2:00 this afternoon. Please remember the admonition of this morning.

2:00 P.M.

The Court: You may proceed.

Mr. Marcus: We have completed our examination of the witness.

The Court: Any redirect?

Mr. Coughlan: No, we have no further questions. [33]

Mr. Coughlan: At this time, your Honor, we would like to move the publication of the deposition of Rufus Doman.

Mr. Marcus: We object to the publication of this deposition on the ground no proper foundation has been laid for the deposition, not shown at the present time that the witness could not be present to testify in person.

The Court: The question is whether he is present now. Is he present now?

Mr. Coughlan: He is not.

The Court: The deposition may be published. You are to consider this testimony just the same as if the witness were testifying. It is a deposition in absence of the witness.

(Discussion off the record.)

Mr. Coughlan: This deposition was taken on behalf of the plaintiff, Mr. Prestidge, at Montpelier, Idaho, on the 19th day of March, 1955, with the consent of Mr. Marcus and myself. Mr. Doman was first duly sworn to testify to the truth, the whole

truth, and nothing but the truth, relating to the cause.

(Deposition then read as follows:)

"Direct Examination

"By Mr. Coughlan:

"Q. What is your name?

"A. Rufus Leonard Doman. [34]

"Q. Where do you reside?

"A. In Montpelier.

"Q. By whom were you employed on the 2nd day of June, 1954?

"A. Rocky Mountain Oil Company.

"Q. Where were you employed at that time?

"A. In Bear Lake County, about twelve miles northeast of Montpelier, Idaho.

"Q. What was your particular job?

"A. At the time I was employed on the rig as a roughneck.

"Q. What was your rate of pay?

"A. $1.75 an hour.

"Q. Who was your immediate supervisor?

"A. Clarence Robinson.

"Q. That operation was one of oil well drilling?

"A. Yes.

"Q. Now, what time of day did you go to work on the 2nd of June?

"A. I believe we went to work the night before. Our hours were irregular.

"Q. What were your hours that particular shift?

(Deposition of Rufus Leonard Doman.)

"A. I believe four in the afternoon. I am not sure, maybe midnight, 12 to 8.

"Q. Were you still on the premises?

"A. It was before I went off shift. I don't remember the time. I went back out to the rig.

"Q. As best you remember, you worked from 12 to 8? That would be the 2nd of June. [35]

"A. Our hours were irregular.

"Q. Was there some sort of a fire there on the premises?

"A. Yes, there was a fire in an open oil can.

"Q. Was that used regularly there for a purpose?

"A. No. We ordinarily didn't have a fire only when it got chilly.

"Q. Do you know who built this particular fire?

"A. No.

"Q. Was the fire burning all night?

"A. Yes, I believe so.

"Q. Where was this can in which you say the fire was located with respect to the actual drilling?

"A. About thirty feet from the rig. On the southeast corner of the mud pit.

"Q. What do you mean by a mud pit?

"A. A mixture of water and a lubricant that they force through the bit to lubricate the bit from the drill. It was mixed in an open pit in the ground.

"Q. What was being used for fuel for this fire?

"A. Diesel.

"Q. What kind of container?

"A. An empty five-gallon motor oil can.

(Deposition of Rufus Leonard Doman.)

"Q. Did it have a spout? A. Yes.

"Q. Was Mr. Robinson there on the premises?

"A. Yes. [36]

"Q. Was he there all during your shift?

"A. Yes, as near as I can remember.

"Q. Was there any type of sign on the premises?

"A. Pertaining to what?

"Q. About visitors. A. I don't recall.

"Q. Was there an accident of some type that morning? A. Yes.

"Q. Will you state what happened?

"A. We were standing around the fire and it started to burn low, so I picked up the can of diesel and told everybody to stand back, that I was going to put some more fuel on the fire. While I was pouring the fuel, the can exploded. The explosion whirled me around and spilled the diesel. When I looked up, Wuthrick and Prestidge were on fire and running. I grabbed Prestidge and threw him to the ground and smothered the fire, and looked around and Wuthrick was still running, so we threw him to the ground and put out the fire on him. I loaded him in my car and brought him to the hospital. After that I went back to the rig.

"Q. Were you there when Mr. Wuthrick and Mr. Prestidge came to the site? A. Yes.

"Q. Had they been there before?

"A. Not that I recall.

"Q. They were not working there? [37]

"A. No.

(Deposition of Rufus Leonard Doman.)

"Q. Where were they standing in relation to you at the time you were pouring oil on the fire?

"A. In back of me.

"Q. Then as I understand it, when the explosion occurred it whirled you around and caused the lighted oil to go upon Prestidge and Wuthrick?

"A. Then when I looked back I could see they were on fire.

"Q. Where were they on fire as best you recall?

"A. All over, mostly on their legs, it seemed to be.

"Q. Where was Mr. Clarence Robinson?

"A. He was in the truck.

"Q. Was he asleep in the truck? A. Yes.

"Q. Did you ever see any geologist on the job there?

"A. There was a man collecting samples from the pit. I suppose he was a geologist.

"Q. How frequently did he do that?

"A. Daily.

"Q. Was he there the day that this occurred?

"A. Yes.

"Q. If you know, was he one of the geologists for the Shell Oil Company?

"A. I do not know.

"Q. Mr. Doman, did you observe Mr. Wuthrick and Mr. Prestidge after the fire was put out? [38]

"A. By observe them, do you mean——

"Q. Did you look at them?

"A. I didn't observe them closely. I loaded them in the car and took them to the hospital.

(Deposition of Rufus Leonard Doman.)

"Q. Did you observe as to whether or not any portion of their body was burned?

"A. It looked to be their legs were burned and their hands.

"Cross-Examination

"By Mr. Marcus:

"Q. Mr. Doman, you were employed and paid by the Rocky Mountain Oil Corporation for this work which you were doing there? A. Yes.

"Q. Was Mr. Clarence Robinson employed by the Rocky Mountain Oil Corporation?

"A. So far as I know. I don't know for sure.

"Q. And this was the company that was carrying on the work out there, meaning the Rocky Mountain Oil Corporation? A. Yes.

"Q. Were these two gentlemen who were burned, Mr. Wuthrick and Mr. Prestidge, working for that company at the time of this fire?

"A. I do not know, but I don't believe so.

"Q. Had they been there the night before?

"A. Not to my knowledge, they had not been there when I went off shift.

"Q. Did you say that your shift ended at 8 and you came to [39] Montpelier before this fire took place? A. I came after the fire.

"Q. The fire occurred before 8 in the morning?

"A. I believe so.

"Q. Do you know what time these two men first came to the place where the fire occurred?

(Deposition of Rufus Leonard Doman.)

"A. I believe it was about 45 minutes or one-half hour before the fire occurred.

"Q. Were you the only employee of the Rocky Mountain Oil Corporation who was there at the fire when they came on the job? A. No.

"Q. Who else was there?

"A. Clarence Robinson and a fellow named Shorty.

"Q. He was an employee of the Rocky Mountain Oil Corporation, too?

"A. Yes. It seems like there was another man employed but I don't recall his name.

"Q. Did you say that before the fire occurred, Mr. Robinson had gone to the truck and had gotten into the cab of the truck? A. Yes.

"Q. So he wasn't there at the time these two men were burned?

"A. He was on the premises about thirty feet from the scene of the accident.

"Q. But you think the other man was standing near the fire, too? [40]

"A. He was near it, too.

"Q. When you picked up the fuel to pour some of the fuel on the fire, where were Mr. Prestidge and Mr. Wuthrick?

"A. When I picked up the can they were standing near the fire.

"Q. Were they across the fire from you?

"A. No. They were on the same side of the fire as I was.

"Q. They were standing beside you. Were they

(Deposition of Rufus Leonard Doman.)

about the same distance from the fire that you were, just before you went to the can to pick it up?

"A. Yes, I would say they were.

"Q. Had you and they and anyone else been standing around the fire talking about the fire burning down if you didn't put some more fuel oil on it?

"A. Yes.

"Q. Mr. Wuthrick and Mr. Prestidge had participated in that little conversation about putting more fuel on the fire?

"Mr. Coughlan: We object to the question as not being proper cross-examination. This matter not having been gone into in anywise on direct examination of this witness."

The Court: He may answer.

"Q. Mr. Doman, will you answer that question? Did they also participate in this talk about the fire burning down and they should put some more fuel on the fire?

"Mr. Coughlan: Objection was that this calls for a conclusion of this witness so far as any [41] participation is concerned."

The Court: He may answer if he knows.

"A. I don't recall whether they participated in the conversation or not. We were all talking about it.

"Q. You say you were all talking about it to the best of your recollection? A. Yes.

"Q. You mean that these two gentlemen and the rest of you were all talking about it?

"A. I suppose so. We were all standing around the fire.

(Deposition of Rufus Leonard Doman.)

"Q. Had you all been talking about getting chilly or getting cold? A. I don't recall.

"Q. How were these two men dressed at that time, Mr. Doman?

"A. They had shirts and pants and coats as near as I recall.

"Q. Do you recall either or both of them saying anything about being chilly or getting chilly or cold?

"A. No.

"Q. When you stepped back to get the can of fuel, incidentally, was that the fuel that you had been using regularly to keep that fire going in the open fire you just described? A. Yes.

"Q. When you went back to get that can, did Mr. Wuthrick and Mr. Prestidge move from their former position around the fire? A. Yes.

"Q. Where did they move to when you went to pour the fuel [42] on the fire?

"A. They, with all the other fellows, moved around behind me away from the fire.

"Q. Did either Mr. Wuthrick or Mr. Prestidge voice any objections to your putting some more fuel on the fire? A. Not that I recall.

"Q. You observed that they had moved to a position in back of you before you actually poured any of the oil on the fire, did you?

"A. Yes. Everyone was clear of the fire except myself.

"Q. Had you or anyone else poured any of this fuel on the fire prior to that time, but after these two men had come up there? A. I don't recall.

"Q. In pouring this on your fire, Mr. Doman,

(Deposition of Rufus Leonard Doman.)

did you do it in any different manner or in any different way than you and others had been putting fuel on the fire before that time?

"A. No. We had replenished the fire several times during the night in the same way.

"Q. And I suppose you had done that many times in the preceding days and nights?

"A. Not usually. Only when it would start getting chilly. I suppose it had been used before but not on my shift.

"Q. Do you actually know what caused the explosion when you poured this fuel on your fire?

"A. No. I was under the impression that diesel did not [43] explode in that fashion.

"Q. You know that this was diesel oil in the can?

"A. Yes.

"Q. Had the flame burned down in this fire?

"A. No.

"Q. I mean prior to the time that you poured it?

"A. No. It was still blazing good.

"Q. How far behind you were these two men?

"A. I do not know. When I turned around they were running. It was impossible to say how far they were.

"Q. But you knew they and the other men were behind you before you poured any of your fuel oil on the fire? A. Yes.

"Q. Were you also burned by this explosion?

"A. Slightly, yes.

"Q. Were you acquainted with these two men prior to their coming out on the job? A. No.

(Deposition of Rufus Leonard Doman.)

"Q. They were strangers to you at that time?

"A. Yes.

"Q. Had they been employed by the Rocky Mountain Oil Corporation?

"A. I do not know.

"Q. Did they tell you why they had come out there?

"A. I don't remember. It seemed that they were looking for work. [44]

"Q. Was this place out in the open where anyone could come up to it?

"A. Yes. There was a gate across the road that had to be opened.

"Q. And they had opened the gate to come in to where you were?

"A. I don't know. It was outside of the rig.

"Q. But you knew at that time there was a gate across the road which they had to travel to get to where you were?

"A. Yes. We were opening and shutting the gate each time we came through.

"Q. As I understand it, this fire was in a part of the five-gallon can which had been cut in two?

"A. I don't recall. I believe it was the whole can. Just the top was out.

"Q. Was the can filled with sand or was it partly filled with sand?

"A. It was partly filled with earth.

"Q. So actually the fire was down in the can?

"A. Yes.

"Q. Have you seen either of these men, Mr. Wuthrick or Mr. Prestidge, since they recovered

(Deposition of Rufus Leonard Doman.)

from their injury? A. Yes.

"Q. Do they live in Montpelier?

"A. I don't know. [45]

"Q. Do you know what they have been doing since that time? A. No."

Mr. Marcus: The next is cross-examination by another party and I assume that should be out.

Mr. Coughlan: Yes. It continues on page 13 with redirect.

"Redirect Examination

"By Mr. Coughlan:

"Q. Mr. Doman, Mr. Marcus asked you about a gate that you went through to get to the drilling site. Where was this gate located?

"A. It was adjacent to the highway where the road to the drilling rig left the main highway.

"Q. Did it go through the right-of-way fence for the highway?

"A. I suppose there was a fence along the highway that the gate went through.

"Q. Approximately how far from the gate to the drilling site?

"A. Approximately two and one-half or three miles.

"Q. Did you have a conversation with a Mr. McIntyre of Rocky Mountain Oil Company?

"A. I have had conversations with him.

"Q. Was there any information imparted to you with respect to Shell Oil Compay?"

Mr. Marcus: To which an objection was made as

(Deposition of Rufus Leonard Doman.)
being irrelevant, incompetent, hearsay, and not [46] binding upon the Shell Oil Company.

The Court: Objection sustained.

"Q. Do you know by whom Mr. Ed Windolph was employed? A. No.

"Q. Did he have a conveyance there at the premises? A. Yes.

"Q. Did this conveyance have any sign on it?

"A. It had Stony Point Development printed on the side.

"Q. Was the man who picked up the samples daily present at the time of the accident?

"A. Yes.

"Q. And was he there for some time prior to the accident? A. For a while.

"Q. Was he also at the fire, standing around the fire? A. Yes.

"Recross-Examination

"By Mr. Marcus:

"Q. This idea of picking up some more fuel to put on the fire was yours, was it?

"A. More or less. I was under no orders to pour more fuel on the fire.

"Redirect Examination

"By Mr. Coughlan:

"Q. Mr. Doman, did you perform this act of replenishing the fire in the course of your employment there? A. Yes.

(Deposition of Rufus Leonard Doman.)

"Recross-Examination

"By Mr. Marcus:

"Q. With reference to that last question, Mr. Doman, you [47] mean that was part of your job. That it was your duty to attend that fire, and keep it replenished?

"A. No more mine than the other fellows' around there.

"Q. You hadn't been given instructions to take care of the fire? A. No.

"Q. Your job with the company was the other work that you have described here? A. Yes."

EDWIN W. WINDOLPH

having been first duly sworn, testified as follows, upon

Direct Examination

By Mr. Coughlan:

Q. Will you state your name?

A. Edwin W. Windolph.

Q. Where do you reside?

A. Brush, Colorado.

Q. What occupation do you follow?

A. Well, we are—I am self-employed. We have an uranium company, oil and construction.

Q. How long have you been in the oil business?

A. For quite some time.

Q. How many years would you say?

A. I think a little over 20 years.

(Testimony of Edwin W. Windolph.)

Q. And what different positions have you held in the oil well drilling business during that period of time?

A. Well, I have been on the floor, that is from roughneck on through.

Q. Well, will you just please explain?

A. Well, as a roughneck——

Q. Just explain the jobs on up?

A. Well, as a roughneck, they handle the tools and do the heavy work around the rig. The driller does the actual drilling with the crew under him, which are three or four [49] of the roughnecks and then over the driller is the tool pusher, and generally over that comes the operator or owner.

Q. And you have held all those positions during the years that you have been engaged in this business? A. Yes.

Q. And how many wells have you drilled or been connected with in some capacity or another?

A. Quite a few, quite a number.

Q. Could you give us an estimate of how many?

A. I would say between 25 and 30 possibly.

Q. Now is there another position in the drilling of a well that you did not mention?

A. Yes, there could be—could be the operator. It could be part of a working interest. There are numerous positions in the oil business that are actually not connected with the drilling of the well itself. There is the chemical side of it.

Q. I mean the entire operation.

A. The entire operation of drilling oil?

(Testimony of Edwin W. Windolph.)

Q. Yes. A. I imagine that——

Mr. Aadnesen: Object to what he imagines.

The Court: Yes, just state what you know.

A. Other positions pertaining to the well would be of course the operator, the leaseholder, the driller himself, the tool pusher, and then of course other aspects in drilling [50] a well would be the least part of it, the interest part of it—the geological part of it and so on.

Q. Taking into consideration your experience in this business, Mr. Windolph, what importance do you attach to the geological phase?

Mr. Aadnesen: Some questions on voir dire, your Honor.

The Court: All right.

Q. (By Mr. Aadnesen): Have you ever seen a geologist? A. No, sir.

Q. Do you have any geological knowledge of your own? A. No.

Mr. Aadnesen: Then we object to this question. He is not a geologist in this particular field.

The Court: He may answer.

A. With geology it is more of a sure operation, I would say, and without it you can become lost.

Q. Directing your attention to an oil well drilling operation in Bear Lake County commonly known as the Give Out Antecline; did you have some connection with that well?

A. Well, I was drilling superintendent for Rocky Mountain.

(Testimony of Edwin W. Windolph.)

Q. And do you recall what period of time that was?

A. My period of time was from the 24th day of April, until the 12th day of July. [51]

Q. And you were on this job when an accident happened on or about the 1st of June, 1954?

A. I was on the job. I wasn't at location at the time of the event.

Q. What did you do in preparation when you were taking over this job of superintendent there at Montpelier?

A. From beginning to the end?

Q. No, just preparation for the——

A. Well, preparations for the drilling of the well with the rotary rig. We moved in a rig from Border, Texas, and rigged it up and commenced drilling operations.

Q. Did you make any phone calls to any member——

Mr. Aadnesen: Object as leading.

The Court: Let him answer the question.

Q. Did you call anyone at that time in the Shell Oil Company organization concerning this operation?

Mr. Aadnesen: Objected to as leading.

The Court: He may answer.

A. Yes, but I was instructed by John McIntyre, president of the——

Mr. Aadnesen: Objected to, your Honor. What he was instructed by John J. McIntyre is not binding on the Shell Oil Company.

(Testimony of Edwin W. Windolph.)

The Court: Objection sustained. Just tell what you did. [52]

Q. What did you advise Mr. Gamble?

A. That we would be ready to commence drilling operations at a certain time.

Q. And do you know who Mr. Gamble is?

A. Yes.

Q. Who is he?

A. I think he is employed by Shell Oil Company.

Mr. Aadnesen: Object on the basis he says "he thinks."

The Court: Do you know?

A. No, I couldn't be positive, no.

Q. (By Mr. Coughlan): Do you know if he is connected with the Shell Oil Company in any capacity? A. Yes, I think so.

Mr. Aadnesen: I would like to go back there and have that stricken for the purpose of an objection.

The Court: Yes, it may be stricken. Answer the question, yes or no, Mr. Windolph.

(Pending question read by the reporter.)

Mr. Aadnesen: Object to that on the basis he previously said he didn't know.

The Court: He can answer it if he can answer it yes or no. [53]

Q. (By Mr. Coughlan): Do you remember the question now?

A. Yes, I do. I don't have positive proof that he

(Testimony of Edwin W. Windolph.)

is a member of Shell Oil Company. I would say, yes.

The Court: He answered the question "yes."

Q. And what did Mr. Gamble tell you?

A. I can't recall the conversation, but the call was that we were waiting for the geologist to arrive before we would commence operation.

Q. And did a geologist then arrive?

A. Yes.

Q. And who is he? A. Mr. McIntyre.

Q. And do you know whom—by whom he was employed? A. Yes.

Q. Who was that? A. Shell Oil.

Q. What date did he arrive?

A. I would say on or about June 1st.

Q. Did he contact you upon his arrival?

A. He contacted me at the Hotel "Burgoyne," whether it was at the time of arrival or not I don't know. It was his first arrival there.

Q. Was that prior to the accident? A. Yes.

Q. Did you have any discussion at the time he contacted you? [54]

A. No, I think we just talked in general.

Q. Did you talk anything about the oil well operation?

A. I don't think so, not that I recall.

Q. Do you recall furnishing Mr. McIntyre with any samples at that time?

Mr. Aadnesen: Object to that on the basis it is leading.

The Court: He may answer.

(Testimony of Edwin W. Windolph.)

A. Yes, I think we had collected some samples.

Q. And he looked at them then; is that right?

A. I think so, although I can't say positively.

Q. How long was Mr. McIntyre on the job there?

A. I think off and on. I think he left Montpelier twice due to failure and breakdown, but I believe the over-all length of time was approximately 30 days.

Q. How often would he be out to the site, would you say?

A. He would be out during the daytime and during the night at different intervals.

Q. He was on the job quite frequently, would you say?

A. Yes, he was a good geologist. He done his duty well.

Q. While you were drilling did you run a 24-hour shift?

Mr. Aadnesen: Objected to as indefinite as to the time, your Honor. [55]

The Court: I suppose it is indefinite, but if you want to tie it down that is something else.

Q. During the month of June did you run a 24-hour shift?

A. Yes, we operated around the clock.

Q. What did Mr. McIntyre do there?

A. He collected the samples.

Q. How were these samples taken?

A. Rocky Mountain furnished the sacks. They are a small sack about, I imagine contained about a

(Testimony of Edwin W. Windolph.)

pound and a half or two pounds of dirt, and the samples are taken from cuttings. They are forced out by mud and then they are washed and put in this sack. They are numbered as to the depth of the well where that particular sample was taken, and although not a true and accurate sample it is pretty close to that footage due to the time it takes to arrive from the bottom of the hole to the top, but each sample sack is tagged with the exact footage that the sample was taken.

Q. And did Mr. McIntyre suspend operations for the purpose of taking these samples?

A. I think on two occasions that we had some good oil shows, and that the bit was pulled off the bottom and samples were taken, yes.

Q. During the time those were taken, necessarily does the actual drilling operation cease?

A. Actual cuttings of the hole ceases, yes. [56]

Q. And at whose requests were these samples taken?

A. One time at Mr. McIntyre's request and possibly two, and I think once I requested they pull off the bottom.

Q. Was the examination of the samples made by Mr. McIntyre? A. Yes.

Q. Was the geological phase of this operation under Mr. McIntyre's direction?

Mr. Aadnesen: Objected to as leading. He testified he was not a geologist.

The Court: He may answer.

(Testimony of Edwin W. Windolph.)

(Pending question read.)

A. Yes.

Q. Did Mr. McIntyre have authority to ask for cores?

Mr. Aadnesen: Object to that as asking for a conclusion.

The Court: Objection sustained. It is what he did.

Q. Did Mr. McIntyre ask for any cores during your operation?

A. If I recall correctly, he asked me at one time if it was posssible to take a core if the showings became better. I advised him that it could be done and Clarence Robinson advised him it couldn't be done, so no core was taken.

Q. What was the condition at that time? [57]

A. We had lost circulation and we had no fluid in the hole.

Q. Does that in some way effect the ability of taking the core, or did it at that time?

A. Yes, it does because your hole must be full of fluid and at that time every time we would have the good oil show we would be faced with lost circulation and the hole would have no fluid in which to get any cuttings.

Q. What procedure is followed in taking a core?

A. Procedure involved in taking a core is that you must first come from the hole and take off your bit and then replace it with a core barrel, a conventional head or diamond head, go back in and

(Testimony of Edwin W. Windolph.)

take the core. Before you take the core you must condition your mud so as to be able to take your core and take your core and come back out, take the core barrel off, put your bit back on and then you go back on bottom and resume drilling.

That is an—or can you give us an estimate of the approximate length of time it takes you to do that operation?

Mr. Aadnesen: Object to it on the basis he said this was not done. It is immaterial.

The Court: I don't see the materiality of it, it wasn't done.

Mr. Coughlan: It was requested and that was our point. [58]

The Court: Yes, I understand that.

Q. What geological phase of the well drilling operation directly connected with the mechanical phase?

Mr. Aadnesen: Objected to as calling for an answer from this witness who is not qualified.

The Court: He may answer if he can.

A. I would say you would have to respect the geologist, yes.

Q. And in the event there are oil shows during the drilling operation do you rely upon the geologist in any way?

Mr. Aadnesen: Object to that as indefinite as to time and calling for a conclusion.

The Court: Objection sustained.

Q. Did you rely upon Mr. McIntyre in the drill-

(Testimony of Edwin W. Windolph.)

ing of this well so far as the geological phase was concerned? A. Yes.

Q. Did you have any oil showings at any time during the time you were drilling the well and Mr. McIntyre was present? A. Yes.

Q. What was the procedure followed then, what was done?

A. Additional samples probably would be taken.

Q. I mean what was done?

A. Yes, additional samples were taken, and two or three [59] times why we would or did come off the bottom and circulate for additional samples.

Q. And was that pursuant to Mr. McIntyre's instructions? A. Twice, yes.

Q. Twice? A. Yes.

Q. Are you familiar with the term used in oil well drilling operations as a "turn key" job?

A. Yes, there is.

Q. What type of operation is that?

A. Turn key——

Mr. Aadnesen: Object to that as immaterial and no foundation for that.

The Court: Objection overruled.

A. A turn key is generally referred to as you have the acreage, we drill the well complete. The drilling—everything that is connected with it and completion. In other words, everything connected with that well from one end to the other including the geological phase of it. We furnish that also. We turn the well over to you complete.

Q. Is that including third-party services, too?

(Testimony of Edwin W. Windolph.)

A. All services.

Q. Now was this job in Bear Lake County we are now talking about; was that a turn key job?

A. No.

Q. Why was it not? How did that job differ from a turn key job? [60]

Mr. Aadnesen: Objected to as immaterial if it wasn't a turn key job.

The Court: Objection sustained.

Q. Do you know whether Mr. McIntyre, the Shell geologist, was present at the time of the accident? A. Yes, he was.

Cross-Examination

By Mr. Aadnesen:

Q. As I understand your testimony, you weren't present at the time of this accident; is that right?

A. I was there immediately after it happened.

Q. But you were not present at the time the accident happened? A. That is right.

Q. And as I understand your previous testimony, Mr. McIntyre contacted you in the hotel the night before? A. Yes, sir.

Q. So far as you know he had never been to that rig? A. That is right.

Q. Now your testimony now that he was present is based upon something else than your actual knowledge, isn't it?

A. Well, he was there when I drove up.

Q. In answer to a question you used the word

(Testimony of Edwin W. Windolph.)

"instructions" so far as it relates to a geologist; is that not more correctly put "requests"?

A. Ask it again please. [61]

Q. In other words, you received no instructions, did you, from the geologist; you received requests; is that right?

A. Yes, I imagine that is about right, yes.

Q. It is your understanding, is it not, that so far as this particular job was concerned Mr. McIntyre had no authority over you in the drilling of that well? A. That is right.

Q. When you used the statement you relied upon the geologist isn't it true you meant by that that you expected he would collect his samples and analyze them? A. Yes, and inform us.

Q. So far as the drilling of that well was concerned, the mechanical aspect of it, and the actual drilling of that well, that was your responsibility; wasn't it? A. Yes.

Q. And you were the supervisor and had complete control and authority? A. Yes.

Q. Was there ever any production received from that well? A. No.

Q. You mentioned the fact they had been broken down several times; it is true, isn't it, you were broken down at the time you related that the accident happened and prior to when Mr. McIntyre arrived in town?

A. Yes, I think it was a parted universal [62] joint.

(Testimony of Edwin W. Windolph.)

Q. Now is it also true you had drilled some prior to that time?

A. I think we drilled from 960 feet to 1010 feet or something like that—1009 feet.

Q. Now the well had been drilled to 900 feet; is that right? A. 960 feet, yes.

Q. And then you put the rotary rig on; is that right? A. Yes.

Q. And you drilled it down to a thousand and something?

A. Yes. I don't recall exactly what it was.

Q. You did that some time the middle of May?

A. We were at that before June 1st.

Q. Before June 1st; is that right?

A. Yes.

Q. And that was prior to the time this accident happened? A. Yes.

Q. And there wasn't any geologist on that job at that time, was there? A. That is right.

Q. Now you stated you talked to Mr. Gamble and said something about you were waiting for a geologist to arrive, you didn't wait, did you?

A. No. [63]

Q. Did you have a geologist on that job before?

A. Lloyd Gray was the geologist on this before with the cable.

Q. Who was Lloyd Gray?

A. He was President of the Rocky Mountain Oil Corporation at that time.

Q. He was there as I understand it before until that well was drilled to a depth of 900 some odd

(Testimony of Edwin W. Windolph.)

feet? A. He was supposed to be, yes.

Q. Do you know where he went?

A. At what time?

Q. Well, do you know when he left the job?

A. No, I do not remember the dates, no.

Q. Do you know of your own knowledge why he left?

A. Mr. John McIntyre and myself went to location and terminated the operation of the cable tool units.

Q. At that time was the time you stated you called Mr. Gamble; was that a request for a geologist?

A. I stated to Mr. Gamble that we would be ready to drill on such and such a day if nothing unforeseen happened.

Q. Isn't it a fact you and Mr. McIntyre requested that Shell send a geologist?

A. Repeat that question.

Q. Isn't it a fact that you and Mr. McIntyre, that is John McIntyre, president of Rocky Mountain Oil, requested [64] that a geologist be sent?

A. Not myself, Mr. McIntyre did.

Q. That was a request, wasn't it?

A. It was a request so far as I was concerned.

Q. Now were you present when any of the cable tool drilling was done? A. I was there twice.

Q. Do you have any information of your own whether samples were collected?

A. Yes, samples were collected.

Q. And that was by this Mr. Gray?

(Testimony of Edwin W. Windolph.)

A. By the drilling crew.

Q. By the drilling crew? A. Yes.

Q. And then turned over to Mr. Gray?

A. I presume so, yes.

Q. And when you were drilling subsequent to the accident, that was the way this procedure happened also, wasn't it; your crew collected these samples? A. Yes.

Q. And then turned them over to the geologist?

A. That is right.

Q. Do you remember seeing Mr. Prestidge and Mr. Wuthrick at the hotel?

A. Yes, on the night before the fire. [65]

Q. And do you recall who was present?

A. Myself and the two boys.

Q. And was Mr. Robinson there? A. No.

Q. Did you speak with these two gentlemen?

A. They asked me for employment.

Q. What did you tell them?

A. I told them Clarence would be in at nine o'clock and that he would give them the information necessary, but that they were not to go out to location unless they had his permission.

Q. Did you subsequently see them again?

A. No.

Q. Did you at any time forbid them to go to that rig?

A. I told them that night not to go unless they had permission from Clarence.

Q. When these requests were made that you

(Testimony of Edwin W. Windolph.)

have talked about, so far as geology was concerned was there a purpose for your complying with them?

A. Only so far as the instructions from John J. McIntyre were concerned.

Q. You were well acquainted and talked with Mr. McIntyre in regard to the drilling of this well?

A. Which McIntyre?

Q. John J. McIntyre. A. Yes, sir. [66]

Q. Now Mr. John J. McIntyre is the president of Rocky Mountain Oil? A. Yes, sir.

Q. Mr. Loren McIntyre is the gentleman that is the geologist; I am now talking about John J. McIntyre. It is a fact, isn't it, that if you or Mr. McIntype didn't desire to, you had no necessity to comply with any requests of this geologist; isn't that true? Isn't that as you understood it?

Mr. Coughlan: I object as it is immaterial as to what he understood, and calls for a conclusion.

The Court: Objection sustained. He can tell what he did.

Redirect Examination

By Mr. Coughlan:

Q. Did you see a Shell geologist on this job prior to the time that Mr. McIntyre came there?

A. There was a man that picked up samples at one time at the cable tool operation and I would surmise he was a geologist, although not certain.

Q. Was he connected with Shell?

Mr. Aadnesen: I object to that.

Q. If you know?

(Testimony of Edwin W. Windolph.)

The Court: He may answer.

A. Yes, I would presume so.

Mr. Aadnesen: I request on the basis of that answer that it be stricken. [67]

The Court: Yes, answer the question whether he was or wasn't. The answer may be stricken. You cannot presume or guess.

Q. Do you know whether or not there was some employee or officer or someone connected with Shell Oil Company on the premises prior to the time Mr. McIntyre came? A. I don't know.

Q. Did you have any authority over the geological phase of this well? A. None whatsoever.

Q. And did you have any authority over Mr. McIntyre, the geologist? A. No.

Mr. Aadnesen: No questions.

(Whereupon, a short recess was taken.) [68]

3:00 P.M.

LANUS W. PRESTIDGE

the plaintiff herein, duly recalled, testified as follows upon

Direct Examination

By Mr. Coughlan:

Q. Did you talk to Mr. Robinson after you had talked to Mr. Windolph at the "Burgoyne" Hotel?

A. Yes, I did.

Q. And what did Mr. Robinson tell you?

A. He said at the time being that the rig was broke down and for us to come out to the rig early

(Testimony of Lanus W. Prestidge.)

the next morning, and that if they had everything under way they would see about putting us to work.

Q. Did you go out then pursuant to that?

A. Yes, I did.

Mr. Coughlan: That's all.

Mr. Aadnesen: No questions. [69]

Mr. Coughlan: At this time we would like the deposition of Dr. Rulon B. Lindsay published. Doctor Lindsay is not present.

The Court: It may be published.

Mr. Coughlan: This is the deposition of Dr. Rulon B. Lindsay taken by the plaintiff at Montpelier, Idaho, on Saturday, May 19, 1956, pursuant to notice. Mr. Coughlan was present, appearing for the plaintiff. Mr. Marcus appeared for the defendant. The testimony of Dr. Lindsay should be considered to the same effect as if he were present and testified personally. [70]

(Following deposition of Dr. Rulon B. Lindsay was read.)

"DOCTOR RULON B. LINDSAY

called as a witness by and on behalf of the plaintiff, was by me first duly sworn to tell the truth, the whole truth, and nothing but the truth, after which the said witness testified and deposed as follows:

Direct Examination

By Mr. Coughlan:

Q. Will you state your name, please, Doctor?

A. Rulon B. Lindsay.

(Deposition of Rulon B. Lindsay.)

Q. And where do you reside?

A. Montpelier, Idaho.

Q. What is your profession?

A. Physician and surgeon.

Q. And are you a graduate of a recognized medical school? A. I am.

Q. Of which school is that?

A. Northwestern University.

Q. When did you graduate, Doctor?

A. In 1932.

Q. And are you licensed to practice your profession in the state of Idaho?

A. Yes; I am. [71]

Q. And how long have you been practicing your profession, Doctor?

A. Oh, about twenty-four years—since 1932.

Q. And you are in the general practice?

A. Yes.

Q. Do you have occasion to treat burns in connection with your practice? A. I do.

Q. Doctor, do you know Mr. Lanus Wayne Prestidge? A. Yes; I do.

Q. And did you have occasion to attend him on or about the 2nd day of June, 1954?

A. Yes, I did.

Q. And what was that occasion?

A. That was when he was brought to the Bear Lake Memorial Hospital with extensive burns.

Q. Doctor, will you just detail what his condition was, as to the extent of burns, and so forth?

A. Well, he had severe burns of the first, second

(Deposition of Rulon B. Lindsay.)

and third degrees, over the face, neck, forearms and legs and ankles—from the hips down.

Q. Did you say his hands and face were also burned, Doctor? A. Yes, sir.

Q. And what treatment did you afford him then, Doctor?

A. Well, the immediate treatment was treatment for [72] shock. The first thing we did was to administer opiates and get him in bed, get him wrapped in anesthetic and antibiotic ointments, with pressure bandages, and supply him with body fluids by the intravenous method.

Q. Now, Doctor, did the subsequent treatment necessitate the changing of these bandages?

A. Yes.

Q. And what is involved in that procedure?

A. Well, these bandages had to be removed from all burned surfaces, and of course they are—after they have been on several days they adhere a lot and cause a lot of pain in removing them.

Q. And is it necessary to administer opiates before you can follow that procedure?

A. Yes, each time we had to administer opiate prior to changing the dressings.

Q. And, Doctor, could you tell us what is involved in cleaning up areas after a burn of that kind? What was involved in this case?

A. Gradually, as you can determine the extent of the burns, and the tissue that is dead, it is the process of removing the dead tissue and finding out how much live tissue there is, and if there is enough

(Deposition of Rulon B. Lindsay.)

to not necessitate skin grafting, or whether a continuity of the skin can be restored without the grafting. [73]

Q. Doctor, what can you tell us about pain so far as Mr. Prestidge was concerned?

A. He had a lot of pain; in fact, there was very shocking pain the first ten days, and then a severe lot of pain over a period of three weeks to a month.

Q. Doctor, will you explain the appearance of the burned areas?

A. Well, when he first came in there were huge blisters over the entire burned surfaces, and, of course, the watery serum underneath.

Q. And what about the skin—what happened to the skin on the burned areas, Doctor?

A. That on second dressing, after we had the shock relieved some, this skin was all removed so that we could apply the dressings directly to the burned areas of the lower layers.

Q. Did that extend down then so you could observe the muscles and blood vessels in his arms and legs?"

Mr. Marcus: To which we object as leading.

Mr. Coughlan: I will withdraw the question.

"Q. (Mr. Coughland, continuing): What could you observe then on the man after his skin came off?

A. Well, as time went on, and after a period of six weeks, we would see what tissue was dead, and of course that was removed, or it sloughed off, and

(Deposition of Rulon B. Lindsay.)

it was down to the muscles [74] and blood vessels in most of the areas of the legs that were burned.

Q. And are the body fluids involved—were they involved in this case, Doctor?

A. Yes. Any time you have a burn, naturally the lymphatics that supply your serum under the layer of skin, to protect the body from pain, and of course, you lose a lot of body serum that way, and that is a constant loss during the time he is healing.

Q. And was shock involved in Mr. Prestidge's case?

A. Yes, it was an important factor the first ten days.

Q. And what did you do with respect to replacing the fluid, Doctor?

A. Well, the way we replaced it, the necessary procedure is to give him fluids in the form of glucose and normal saline intravenously.

Q. And, Doctor, do you recall how long Mr. Prestidge was in the hospital?

A. I think I discharged him about July 15th. That was from June 2nd to July 15th.

Q. And was he under your treatment during all of that time? A. Yes, sir.

Q. And then did you attend him subsequent to the time he left the hospital?

A. Yes, I attended—was in contact with him for three [75] or three and one-half months following his release.

Q. And, Doctor, what, if any, permanent effect does Mr. Prestidge have as a result of these burns?

(Deposition of Rulon B. Lindsay.)

A. Well, he has a lot of scars and contracture that limits the degree of motion and the activities of his lower extremities.

Q. What is the effect on the nerves, Doctor?

A. Well, the nerves in this scar tissue and contracture areas are less sensitive and are more subject to damage because of lack of normal reflexes in the body's protective mechanism, both from the standpoint of accident, and from the standpoint of heat or cold injury.

Q. And what is the effect, Doctor, in the event of reinjury of these areas?

A. In case they are reinjured the healing process would be impaired considerably because in scar tissue the blood supply is limited and the healing is retarded.

Q. And what about the sensitivity of the areas, Doctor?

A. It is much less sensitive than normal tissue, normal skin.

Q. And does that have some effect on reinjury?

A. Yes, especially in the case of being frost bitten, or other burns. They are not sensitive; they may unconsciously be burned or frozen without realizing the temperature change is that great. [76]

Q. Doctor, was there some blood loss involved so far as Mr. Prestidge was concerned?

A. No, I don't believe there was any appreciable loss changing the dressings. Each time, of course, there was some blood loss. I think the main loss of

(Deposition of Rulon B. Lindsay.)

blood was not in whole blood but mainly in blood plasma.

Q. And that is the fluid, I presume, that you mentioned? A. The fluids; yes, sir.

Q. Doctor, is there a factor of fear, so far as the patient is concerned, in extensive burns? Does that enter into the apprehension?

A. Yes, severe shock—with severe shock there is always severe apprehension.

Q. And, Doctor, was it necessary for Mr. Prestidge to remain in one position while these burns were healing?

A. Yes, it was impossible for him to move and change positions without actually being lifted and turned by the aid of the nurses and help.

Q. And that, I presume, is a factor in a patient's discomfort, isn't it, Doctor? A. Yes, sir.

Q. Doctor, the effect of the burns on Mr. Prestidge—and you say this will be permanent or of a permanent nature?

A. Yes, that will be permanent.

Q. And, Doctor, you would not expect then any improvement over the time you saw him? [77]

"Mr. Marcus: That is objected to as being leading and suggestive."

"Q. (Mr. Coughlan, continuing): Doctor, would you say—what would you say as to Mr. Prestidge's prognosis?

A. Well, I observed him over a period altogether, during his stay and after he was discharged from the hospital of approximately six months, and

(Deposition of Rulon B. Lindsay.)

I believe the full extent of improvement, and the feeling, had at that time come to a standstill, and no more improvement could be expected.

Q. And what would you say, Doctor, as to whether or not he suffers from disability as a result of the burns?

A. I think that he does suffer from considerable disability due to the fact that the blood supply in the legs is impaired. Also the motion and movement from all activity or labor where lag work is necessitated, I think it would be much impaired, in his ability to carry out these activities.

Q. And how long would that continue, Doctor?

A. Well, I think that condition is permanent. I don't think that will change or improve any.

Cross-Examination

By Mr. Marcus:

Q. Were you acquainted with Mr. Prestidge prior to the time you treated him, Doctor?

A. No; that was the first time I had ever come in contact [78] with him.

Q. You had never treated him before?

A. No; I didn't even know him.

Q. Was he coherent at the time he was brought to you the first occasion after the accident?

A. He was extremely hysterical and unable to co-operate in any way in aiding and allowing us to treat him, or anything. We just had to go ahead and take care of him.

(Deposition of Rulon B. Lindsay.)

Q. Did he give you a history of how the injury had occurred?

A. All he said was that he was burned with burning oil, and that is all he told us at the time.

Q. Later, Doctor, did he say anything about for whom he was working at the time of this occurrence?

A. Yes, later he gave a history of where he was, and what had happened. He stated that——"

Mr. Coughlan: I object to that. I believe you have answered that, Doctor. I will have to object to that question as to employment, or whether there was any employment at all, on the ground it is not proper cross-examination; not covered on direct examination.

The Court: Read the question.

(Pending question read.)

The Court: He may answer if he knows. [79]

"A. He said that he had reported that morning to the oil drilling company. Of course, I didn't know at the time what oil drilling company it was—that he had reported for work, and while they were waiting for the foreman to come that they were trying to keep warm with a fire that was built there, and the fire had gone down, and somebody picked up a can of fuel oil and threw some on the fire, and it exploded and covered him with oil. And that was the history he gave as to how it happened.

Q. Did he later tell you what company he was working for, or had reported to work for?

(Deposition of Rulon B. Lindsay.)

A. Well, I think he called it the Rocky Mountain Drilling Company.

Q. Was it the Rocky Mountain Oil Corporation?

A. As near as I know. I can look at my records, because I had to get that history from him, and that is the Rocky Mountain Drilling Company (Great Western Petroleum Company).

Q. Doctor, will you refer to your entire file on Mr. Prestidge? Do you have your entire file on him?

A. I have my records. I don't have my hospital records here. They are in the hospital.

Q. May I take a look at those for just a minute?

A. Yes. (Hands papers to Mr. Marcus.)

Q. And, Doctor, these instruments you have handed me are reports you made, or notes, or copies of reports in [80] connection with Mr. Prestidge's treatment? A. Yes, sir.

Mr. Marcus: Could I have these marked for identification, please?"

The Court: Are they marked as one exhibit?

Mr. Marcus: Yes.

"Q. Doctor Lindsay, referring to Defendant's Exhibit No. 1 (now marked Defendant's Exhibit 6), so marked for identification, would you go through those instruments and just tell what they are so that the Reporter can get it down?

Mr. Coughlan: Just a moment, Doctor. I will object to this, but first, I want to ask a question: Doctor, are these your office records, your own office records?

(Deposition of Rulon B. Lindsay.)

A. These are copies. There are three papers here that are copies of reports.

Mr. Coughlan: But they are your own records?

A. Yes, sir.

Mr. Coughlan: For the purpose of the record we will object to any attempt by the defendant to introduce the doctor's own records, on the ground they are privileged; that it is not proper cross-examination, and the doctor is present to testify. I think that is all of the objection."

The Court: What have you to say about [81] that?

Mr. Marcus: By reason of taking the deposition I believe the privileged part of it is removed.

The Court: I am going to reserve my ruling on that.

"Q. (Mr. Marcus, continuing): Now, Doctor, could you tell the Reporter what those instruments are, from the top to the bottom?

Mr. Coughlan: And we further object to this upon the ground that the instruments, if admitted, are not the best evidence. Now, go ahead, Doctor."

Mr. Zener: Your Honor, there is an answer after that objection.

The Court: You mean the rest of it follows with respect to the exhibits?

Mr. Zener: Yes, apparently so.

Mr. Marcus: Next is the answer by the Doctor identifying these exhibits.

The Court: I am going to exclude the exhibits for the time being unless I can be shown some

(Deposition of Rulon B. Lindsay.)

authority for getting them in. The Doctor is being questioned about what happened.

Mr. Marcus: We point out that on direct the Doctor had been referring to these instruments, and therefore I think we would be entitled to have them put into evidence. They are the best evidence, [82] of course.

The Court: You can cross-examine him on anything he referred to but they are his notes.

Objection sustained.

Mr. Marcus: The next questions and answers pertain to those exhibits and I presume they should be omitted by the ruling.

The Court: Yes, that is right.

Mr. Marcus: I don't know whether those questions and answers contained the submission of those in evidence but later on we did submit them in evidence and may it be considered here. We submit them.

The Court: You are offering them?

Mr. Marcus: Yes.

The Court: Very well, the objection will be sustained.

Mr. Marcus: On page 18 would be the next pertinent part, starting with this question:

"Q. (Mr. Marcus, continuing): Doctor, these are the notes you were referring to in your direct examination, are they? A. Yes, sir.

Q. Did Mr. Prestidge tell you what his occupation had been prior to the time of this accident?

(Deposition of Rulon B. Lindsay.)

A. No, I don't believe he did. I don't recall at this time. [83]

Q. Was he a married man, Doctor Lindsay?

A. No, sir; he was single at that time.

Q. And, as a matter of fact, wasn't it—didn't the accident occur on June first, instead of on June second.

A. Yes. In referring to my notes I have it June first.

Q. No other physician treated Mr. Prestidge before his treatment by you? A. No.

Q. Now, Doctor, in your report you indicated that he was progressing satisfactorily under your treatment until he was discharged?

A. Yes, I think we could say for that type of case that he progressed as well as could be expected.

Q. Generally speaking you had a good recovery in the treatment of him?

A. Yes, as good as we could expect under the degree of injury.

Q. And when he was released was he able to walk without the use of crutches or a cane, Doctor Lindsay?

A. Yes, we was able to walk on a level floor, or ground, without the aid of a cane or anything.

Q. And he was released some time in July?

A. Yes, I think it was the fifteenth of July.

Q. Had he been walking around in the hospital prior to the time you released him? [84]

A. He had for, I think, about one week.

(Deposition of Rulon B. Lindsay.)

Q. When did you next see him after he was released from the hospital?

A. Well, I haven't that down here in these particular records, but I saw him once or twice a week—never less than once a week—for the next three and one-half months.

Q. Two and a half months, did you say?

A. Two and a half months.

Q. And at the end of that time he was entirely released from your care, was he, Doctor Lindsay?

A. Yes, as what we call surgically cured.

Q. After that period of time you considered him surgically healed? A. Yes, sir.

Q. And did he remain here in Montpelier?

A. I don't believe he did, after that time. I think he left.

Q. Do you know whether he did any work after you released him?

A. I don't know. I have no direct knowledge that he did.

Q. And would you have considered that he was not able to carry on gainful employment in a job that required him to be on his feet very much of the time, at the time you considered him surgically healed? [85]

A. I would consider that if he had to do much walking that he wouldn't be able to carry on the duties of a job, if he would have had to do that. He might stand and be able to do some work without too much exertion walking.

(Deposition of Rulon B. Lindsay.)

Q. What work has be been doing since that time? Do you know?

A. The only thing is—and this is hearsay—that he tended bar a little while, and that is the only employment that I know he has had.

Q. Had he also been a bartender prior to this occurrence?

A. I don't know what his occupation was.

Q. And you say, Doctor, because of the effect these injuries had on the skin, he would be less sensitive to pain, or sensation?

A. Less sensitive to sensation.

Q. Was he crippled in any way by reason of nerve injuries?

A. Yes—well, that is a rather difficult question to answer straight out. I think there was some disability due to nerve injury.

Q. What I am getting at is: Did he drag his leg, or was his leg numb, so he couldn't use it without crutches or some other assistance?

A. Not from a nerve standpoint, I wouldn't say.

Q. And did you prescribe exercises or any kind of self-treatment that you would consider proper to improve this condition? [86]

A. Oh, yes. I prescribed and recommended massage of the scar areas with oils.

Q. And did you urge him to continue that kind of treatment after his release by you?

A. Oh, yes; I advised him to.

Q. Has he ever paid you the doctor bill that he owed you? A. No.

(Deposition of Rulon B. Lindsay.)

Q. He didn't? A. No.

Mr. Marcus: I believe that is all.

Redirect Examination

By Mr. Coughlan:

Q. Doctor, have you ever been paid your bill by anyone at all? A. No; I never have.

Q. That bill is still due and owing?

A. Yes.

Q. Now, didn't your last report, dated July 7th of 1954, indicate as to permanent disability, "not likely,"——

Mr. Marcus: Mr. Coughlan, are you referring to a portion of what has been submitted here as Defendant's Exhibit No. 1 (now 6) for identification?

Mr. Coughlan: Yes.

Q. (Mr. Coughlan, continuing): You saw Mr. Prestidge after that time, did you not, for several months? [87] A. Yes.

Q. And your testimony as to disability is based upon the last time you saw him, is it not?

A. Yes, sir.

Mr. Coughlan: I believe that is all.

Mr. Marcus: That is all."

Mr. Marcus: Your Honor, we would like to resubmit the exhibits in light of the subsequent examination and testimony of the Doctor and the questions asked by Mr. Coughlan.

The Court: Of course, he didn't know the objec-

tion was going to be sustained. Ladies and gentlemen, we will recess until tomorrow morning at 9:30 a.m. [88]

May 25, 1956

LOREN McINTYRE

having been first duly sworn, testified as follows, upon

Direct Examination

By Mr. Zener:

Q. Will you state your name, please?

A. Loren McIntyre.

Q. Where do you reside?

A. Grand Junction, Colorado.

Q. What is your present employment?

A. Geologist.

Q. How long have you been a geologist?

A. About three and a half years.

Q. By what company are you employed?

A. Shell Oil Company.

Q. Have you been employed by them for the three and a half years you have mentioned?

A. Yes, sir, I have.

Q. Then you were a geologist for the Shell Oil Company in the months of May, June, July of 1954?

A. That is correct.

Q. Are you acquainted with what has been called the Give Out Antecline located in Bear Lake County, Idaho? [89]

A. I am acquainted with that area.

Q. When did you first make your acquaintance

(Testimony of Loren McIntyre.)

with that area? A. On or about May 30th.

Q. Is that the land or a portion of the land where certain drilling operations were conducted by Rocky Mountain Oil Corporation in 1954?

A. It is.

Q. Had you any knowledge of this area geologically prior to your visiting the area in person?

A. No.

Q. Had you made any study of the geology of that area? A. No.

Q. Prior to that time? A. No.

Q. Had you seen any geological data? That is any geological data compiled on this area before you visited the area?

A. I am not aware of any.

Q. When you came there you had no knowledge of the geology of the area you were visiting; is that right? A. That is right.

Q. Nobody had ever discussed the particular area with you or its geology? [90]

A. It was quite likely discussed. I don't recall seeing any maps or anything on the area.

Q. When you say it was quite likely discussed, was it discussed by you with any of your superiors or co-workers in Shell Oil Company before coming to the area? A. Yes.

Q. What generallly was the information that you gained about the area from those discussions?

A. Just the type of rock we could expect there.

Q. Did you examine any maps or surveys or previous studies that had been made on the area?

(Testimony of Loren McIntyre.)

A. No.

Q. By whom were you sent to this area?

A. Mr. Kirby.

Q. Who is Mr. Kirby?

A. District Geologist for the Grand Junction District, Shell Oil Company.

Q. Did he give you any instructions as to what you were to do when you arrived in that area?

A. Yes, he did.

Q. What were they?

A. I was to collect the samples and geological data and transfer it to him.

Q. Montpelier, Idaho, is one of the towns in Bear Lake County; is it not?

A. Yes, it is. [91]

Q. When did you arrive at Montpelier?

A. May 30th.

Q. Did you contact anyone in connection with this drilling on the occasion of your first arrival?

A. No, I did not.

Q. Did you visit the area in which the drilling was being conducted?

A. Yes, visited the locality, yes.

Q. Did you go up to the drilling site?

A. Yes, I did.

Q. And on what day was that?

A. Evening of May 30th.

Q. Was there anyone up there or any drilling going on at the time? A. There was not.

Q. Did you become acquainted with Mr. Wuthrick? A. No, I did not.

(Testimony of Loren McIntyre.)

Q. At any time during your visit there at the drilling site?

A. I was at the site at the same time he was but I did not become acquainted with him.

Q. Did you make the acquaintance of the drilling crew who were conducting the drilling operations there?

A. Speaking acquaintance, yes.

Q. Who were those persons that you met? [92]

A. I met Mr. Robinson and Mr. Windolph, and the majority of the rest of the persons I don't know their names.

Q. Do you know their connection with the drilling?

A. Well, I couldn't tell their connection, no. I believe Mr. Windolph was the drilling superintendent and Mr. Robinson the tool pusher.

Q. Did you have any contact with Mr. Windolph following your first visit to this well site?

A. On the evening of May 31st I met Mr. Windolph the first time.

Q. Where did you meet him?

A. At the hotel in Montpelier.

Q. What, if anything, did you discuss with him at that time?

A. Just generally talked and he did show me some samples that they had at the depth they were at this time.

Q. You discussed the well drilling operation out there, I take it?

(Testimony of Loren McIntyre.)

A. I don't think we discussed the actual operation, no.

Q. Did you discuss anything about the depth of the well?

A. Yes, I probably asked him what the depth was.

Q. Did you discuss anything about the geological formations that had been encountered? [93]

A. No, he had the sample there.

Q. Did he furnish you with a sample?

A. Yes.

Q. And did you make an examination of it?

A. Yes, I did.

Q. Did you report the result of that examination to your employer, Shell Oil Company?

A. I did.

Q. When did you do that?

A. I did that the following morning.

Q. What was the next occasion for your visiting this well site? A. June 1st.

Q. And about what time did you arrive at the well site?

A. About six in the morning, I guess.

Q. Were there persons present there at that time? A. Yes, there were.

Q. Could you name those that you recall at this time?

A. There was Mr. Doman and Mr. Robinson was asleep in a truck, and a person they call "Shorty."

Q. Do you recall seeing Mr. Prestidge there, the gentleman who is the plaintiff here?

(Testimony of Loren McIntyre.)

A. Yes, he came in later after I did.

Q. Were you present at the site at the time the accident [94] or incident happened that Mr. Prestidge testified about? A. Yes, I was.

Mr. Marcus: Object to these questions as improper examination of an adverse witness.

The Court: Objection overruled. He can ask him anything he wants to about it.

Q. Following this incident you remained there as a geologist; is that right?

A. Yes, until about July 1st.

Q. And how frequent did you visit the drilling site?

Mr. Marcus: May I ask a question in aid of an objection?

The Court: Yes.

Mr. Marcus: Does this relate to periods of time subsequent to the date of this occurrence, Mr. Zener?

Mr. Zener: Yes.

Mr. Marcus: Object on the grounds it is incompetent.

The Court: Objection overruled.

(Reporter read the following question as requested, "Q. Were you present at the site at the time the accident or incident happened that Mr. Prestidge testified about?")

A. About once or twice a day. [95]

Q. And would those visits be of all hours of the day and night or occasionally?

(Testimony of Loren McIntyre.)

A. No, they would not.

Q. What was your purpose in visiting the site on those occasions?

A. Just to pick up samples.

Q. Did you pick up samples at the well site?

A. Yes, I did.

Q. Who furnished those samples to you?

A. Rocky Mountain Oil Company.

Q. Will you tell the jury how you picked up the samples and how they were handled by you?

A. The samples were collected in small canvas bags and usually stacked by the house or out by the ground there, and I would just drive out and pick them up.

Q. What can you tell the jury is the purpose of collecting these samples in the process of the drilling of this well?

A. To look for oil showings and to examine the geology.

Q. And that was your function to determine if there were oil showings and to make certain geological conclusions from the examination of these samples; is that right? A. That is correct.

Q. And you did that of course when you collected samples—you examined them? [96]

A. I examined them after I took them back to the motel, yes.

Q. Did you report as to what you found from the samples?

A. I reported, yes, to Grand Junction.

Q. That is your employer, Shell Oil?

(Testimony of Loren McIntyre.)

A. Yes, that is right.

Q. You sent those reports in regularly after making examinations of the samples?

A. Yes, sent those reports in once a day.

Q. Did you also send the samples or simply the report of your findings on them?

A. I sent the samples at a later date when we had collected enough for shipment to Salt Lake.

Q. Do you know at whose request you were sent to this drilling site?

A. I was sent at the request of my immediate superior, Mr. Kirby.

Q. Do you know whether any request was made by Rocky Mountain Company to have you sent there? A. Not definitely.

Q. What do you mean by that?

A. I believe there was a telephone call, but I didn't take the call so I don't know who it was about for sure.

Q. Were you advised that your presence or the presence of some geologist had been requested to be in attendance at this drill site? [97]

A. I was only told to report to the drill site.

Q. Before you reported there did you know the company that was engaged in the drilling?

A. I knew the name, yes.

Q. Did you know any of the personnel?

A. No, I didn't.

Q. You acquired that information from your employer, I take it? A. Yes.

Q. Do you know whether or not prior to your

(Testimony of Loren McIntyre.)

being at this drill site if there had been any other geologist from your company at the well site?

A. To the best of my knowledge there had not.

Q. Do you know positively whether that was the case or not?

A. No, I didn't—I mean I do not.

Q. As I understand your testimony you came to this well site for the purpose of doing the geological work you have outlined without any previous knowledge of the geology of this county or the preliminary geological work that may have been done in the area; is that right? A. That is correct.

Q. You knew nothing whatever about the geology of this area except what you gained after you got there as a geologist for Shell Oil [98] Company?

A. I was informed as to the formations we could expect to encounter, yes.

Q. And who informed you of that?

A. Mr. Kirby.

Q. And he was your immediate superior?

A. Yes; that is right.

Q. Do you know from what source Mr. Kirby obtained his information in regard to the geology of this area?

Mr. Marcus: May it be understood our objection runs to all the testimony here on the ground it is incompetent, immaterial and irrelevant.

The Court: Yes.

A. I do not.

Q. You do not know of your own knowledge of

(Testimony of Loren McIntyre.)

any geological work having been done in that area then? A. I do not.

Q. Now isn't it a fact, Mr. McIntyre, that the Shell Oil Company held oil rights to considerable area immediately surrounding this particular well site?

A. I have nothing to do with the land rights, I would not know.

Q. Isn't it a fact that Shell Oil Company held leasing rights or oil rights and considerable land immediately surrounding this area?

A. I would not know. [99]

Q. You did not know then and you to not know now that they had interests in that area?

A. I could not say for a certainty. I could give a belief on it.

Q. What is your belief on it?

A. I believe that they probably did hold some interests in that area.

Q. As a matter of fact, you knew they held substantial acreages immediate adjacent to this drilling site? A. No, I did not know.

Q. You don't know that either now, do you?

A. No, I don't.

Q. What was the benefit to your company of the geological work and determinations that you made at this particular well site?

Mr. Marcus: We object to that as calling for a conclusion of this witness. He is simply a geologist. He isn't in a position of management for this company.

(Testimony of Loren McIntyre.)

The Court: He may answer.

A. Well, there would be some value of the entire area and region of that country in the geological aspects, and of course if it was a producing well it would show that region of Idaho as an oil province.

Q. When you say it would be of some values, what particular values do you have in mind? [100]

A. Of a geological nature.

Q. Isn't it a fact that the geological findings and determinations you could make from examining the samples of this well would be indicative of the type of geology and the likelihood of oil for the entire area?

A. We would hope it would be indicative of the geologly and the likelihood of oil I could not answer.

Q. Well, your geological studies are made for the purpose of determining whether there is a possibility or probability of oil being there?

A. A possibility, yes.

Q. And depending upon those you formulate opinions as to the value of the field as prospective oil producing area; isn't that a fact?

A. That could be, yes.

Q. Well, why do you have a geologist examine these samples?

Mr. Marcus: We renew our objection to this questions. The purpose of this drilling was to obtain the samples and that is obvious.

The Court: Let the witness answer. He may answer that question.

(Testimony of Loren McIntyre.)

A. Is this a general question or just on this one well?

Q. I am talking about this particular well.

A. We were looking for the nugget [101] sandstone.

Q. Did that sandstone have some significance with respect to the presence of oil in the area?

A. It is producing of oil bearing samples in Wyoming, never been produced in Idaho.

Q. Its presence if you should find it there is indicative of the presence of oil; is that geologically correct? A. No, it is not.

Q. Then what is the significance of the finding of this particular sandstone?

A. It could possibly be a reservoir rock.

Q. What do you mean by that?

A. Have the adequate base to contain oil or fluid of some type.

Q. You were doing geology in this area and on this particular well for the purpose of determining its value for oil only, weren't you, or gas?

A. Well, I was not doing the geology in that area. On this particular well I was looking for the sandstone and if it had oil shows I would attempt to give some valuation to it, yes.

Q. Were there some oil showing found in this well during the time you were there?

A. Yes, there were.

Q. And on those occasions did you make requests or did you ask the operators of this well to furnish you with [102] samples?

(Testimony of Loren McIntyre.)

A. I requested that if possible they could give us samples, yes.

Q. When these showings were encountered what procedure was taken on your requests?

A. On oil showings we would ask them to come off bottom and circulate up the samples so we could evaluate the samples.

Q. Was that done on more than one occasion while you were there?

A. I can't recall the exact number. It would be one or two times, yes.

Q. When you made those requests they were complied with, were they, by the persons in charge of the drilling? A. Yes, they were.

Q. I take it you made these requests for circulating the well and bringing up the samples because of certain conclusions you had reached from reading or examining the samples that had previously been furnished to you; is that correct?

A. If the samples had oil showings I would generally ask them to circulate the samples.

Q. And that is what you did on the occasions here at this well? A. Yes. [103]

Q. To whom did you communicate the information that you gathered from having the well circulated and the samples taken from time to time?

A. Mr. Kirby.

Q. Did you communicate that information to anyone else?

A. I was free to communicate it to Rocky Mountain if they requested it.

(Testimony of Loren McIntyre.)

Q. Did they request it?

A. They were just waiting for oil showings as I was so I would say they probably did not.

Q. Did you advise them what you had seen or what you had determined from your examination of these samples and circulating the well you testified about? A. No, I did not.

Q. That was conveyed then I take it only to your employer Shell Oil?

A. Unless requested by Rocky Mountain—I could not recall any request they made other than they might have asked the type of rock we were in.

Q. They had an interest along with Shell Oil Company in knowing what type of rock they were in and what formations they were going through; didn't they?

Mr. Marcus: Object to that as calling for a legal conclusion as to what interest they had [104] together.

The Court: I think I will have to sustain the objection to that question.

Q. On how many occasions were drilling operations suspended at this well in order to obtain the samples for you or to circulate the well as you have described?

A. I believe it was suspended only once for circulation of samples.

Q. Did you request a core be taken out of the——

A. I asked them if it was possible to take a core, a certain core, yes.

(Testimony of Loren McIntyre.)

Q. Was that request of yours complied with?

A. It was not.

Q. Was there some explanation made to you as to why it could not be done at that time?

A. There was.

Q. What was that explanation?

A. They had lost circulation at the time and had an abundance of lost circulation material in the mud which would plug up the core barrel.

Q. You understood what they meant in oil drilling terms, I suppose?

A. It seemed very reasonable to me, yes.

Q. That was a reasonable explanation for their not furnishing you with a core at that particular time? [105]

Mr. Marcus: Object to that as calling for a conclusion. He stated what explanation was given.

The Court: Objection sustained.

Q. Are you acquainted with the mechanical procedure that is involved in circulating a well?

A. I understand it only to the extent they raise up off bottom and do circulate samples up.

Q. Does that susupend the actual drilling operation while that is being done?

A. It would suspend the actual drilling.

Q. And about how long does that procedure take normally, or did take on this occasion?

A. 15 to 30 minutes.

Q. Do you know what depth the well had been drilled when you arrived there or were you advised of that? A. 1,002 feet.

(Testimony of Loren McIntyre.)

Q. 1,002 feet? A. Yes.

Q. Approximately what depth had been drilled when you left the site in July?

A. I can't recall.

Q. Approximately?

A. 3,000, I believe. [106]

Cross-Examination

By Mr. Marcus:

Q. Mr. McIntyre, has your work with the Shell Oil Company been entirely confined to geology?

A. Yes, it has.

Q. Have you had any experience whatever in the actual drilling operations of drilling an oil well? A. No, I have not.

Q. And counsel asked you if you had instructions when you went up there, I will ask you what those instructions were with reference to your duties on that job?

A. They were only to collect the samples and report back in to Mr. Kirby.

Q. Did you have any instructions at any time that you were to have anything to do with the actual drilling operations?

A. No, on the contrary I was not.

Q. Did you at any time while you were up there have anything to do with the actual drilling operation by the Rocky Mountain Oil Corporation?

A. I did not.

Q. Your duties were restricted entirely to pick-

(Testimony of Loren McIntyre.)

ing up those samples and making your geological examination; is that right?

Mr. Coughlan: Object to that as leading. [107]

The Court: He may answer.

(Reporter read the pending question.)

A. That was correct.

Q. Did you at that time or were you subject at that time to any written regulations of your company with respect to duties of a geologist picking up samples on such an operation? A. I was.

Q. Will you identify what is marked Defendant's Exhibit 7?

A. This is a letter of instructions from Mr. Barkell to all geologists in the Salt Lake City division regarding well sitting duties.

Q. Well sitting duties? A. Yes.

Q. And is that what your duties would be called in carrying out the work you have described here?

A. That is correct.

Q. And were those regulations and instructions in effect at the time you came up to the well?

A. They were.

Q. And they were known to you?

A. Yes, they were.

Mr. Marcus: We offer Exhibit 7.

Mr. Zener: May I ask some questions? [108]

The Court: Yes.

Q. (By Mr. Zener): These instructions you are referring to were furnished only to employees of Shell Oil Company by their superior; is that cor-

(Testimony of Loren McIntyre.)

rect? A. That is correct.

Q. They were not available or known to anyone outside of your organization?

A. To the best of my knowledge, no.

Mr. Zener: We object on the ground it is incompetent, irrelevant and immaterial, and not binding upon third parties. It is self-serving and relates only to the relationship between Shell Oil and its employees.

The Court: I assume it is preliminary. I think you had better ask some more questions before I rule.

Q. (By Mr. Marcus): With respect to your instructions did you at all times abide by and conform to those instructions in carrying out your duties there at the well near Montpelier?

A. I did.

The Court: Exhibit 7 may be admitted.

Q. And you say the first time that you ever saw this well site or drill site was the evening before this accident took place? [109]

A. I believe it was two evenings before, it was May 30th.

Q. And that is the only time you were on the drill site prior to the time of this accident?

A. That is correct.

Q. And was Rocky Mountain operating—were they drilling at the time you went up there the first time? A. They were not.

Q. Were they shut down at that time?

A. Yes, they were.

(Testimony of Loren McIntyre.)

Q. Were there any employees present at the drill site when you were up there?

A. Not on my first arrival, no.

Q. The next time you were there was on the morning of June 1st? A. That is correct.

Q. Was that the time of this accident we are talking about? A. Yes, it was.

Q. Now you were present when Mr. Wuthrick and Mr. Prestidge came up to the drill site?

A. I was.

Q. At that time was this fire burning that you have heard described by other witnesses?

Mr. Zener: To which we object because I [110] think no inquiry was made on our behalf.

The Court: Objection sustained.

Q. Now you say you visited the drilling operations once or twice each day?

A. That is correct.

Q. And what did you do during the time that you went out there to visit the drill site?

A. I just collected up the samples and would hang around for a few minutes to watch those.

Q. How long were those visits at the site of the drill?

A. Generally from one to two hours.

Q. I believe you said on one occasion you asked them for a core and you were refused; is that true?

A. That is true.

Q. With respect to your geological work is that restricted and has it been restricted to a certain type of geology? A. It has.

(Testimony of Loren McIntyre.)

Q. Certain phase of geology? A. It has.

Q. Would you describe to the jury what that has been?

A. It is called stratigraphy. It is an accumulation of drill cuttings.

Q. It is—there is a definite field of geology concerning the rock formations? [111]

Mr. Zener: Object on the ground it is beyond the scope of our examination.

The Court: Objection sustained.

Q. But your work has been entirely restricted to the phase that you have described?

A. Yes.

Redirect Examination

By Mr. Zener:

Q. The phase of the work you have done geologically has to do with the determination of geological facts that indicate or do not indicate the presence of oil; is that not right?

A. No, not necessarily.

Q. What purpose were you serving then at this oil drilling rig?

A. So I could notify the geology as we encountered to our immediate superior and when and if we reached the sandstone as I mentioned before.

Q. Wasn't it a matter—as a matter of fact, wasn't it designed to determine the likelihood or possibility of oil being in this area?

A. We were looking for oil shows of course in the immediate area.

(Testimony of Loren McIntyre.)

Q. But you were looking for oil, weren't you?

A. Well, yes. [112]

Q. Now in the taking of these samples in order to take those samples what mechanical operations are necessary in respect to the drilling operations?

Mr. Marcus: This is repetitious and object to it on that ground.

The Court: I don't remember that that was covered.

A. With respect to drilling there was no mechanical operations.

Q. Well, what mechanical operations were necessary?

A. Only that someone collect the samples out at the end of the flow line.

Q. At the end of what? A. The flow line.

Q. This flow line, where does that come from?

A. It comes from where the mud comes out the hole.

Q. Comes from the bottom of the well or where the drilling operation is being conducted?

A. Mud comes from there, yes.

Q. Doesn't the samples come from there, too?

A. Yes.

Q. As a matter of fact, the samples are an example of the type of rock formation that the drilling cut through; isn't that what it amounts to?

A. Yes, what the drill has cut through. [113]

Q. And so the sample that you received was a product of the drilling operation; isn't that right?

A. It came as a result of the drilling, yes.

(Testimony of Loren McIntyre.)

Recross-Examination

By Mr. Marcus:

Q. Was there any actual drilling at all on the morning of the first from the time you got out there up to and including the time this accident occurred? A. There was not.

Mr. Marcus: That is all.

Mr. Zener: That is all.

Mr. Marcus: May we present a matter to the Court at this time?

The Court: You may.

(Jury was duly excused.) [114]

Mr. Coughlan: If your Honor please, at this time the plaintiff moves that pursuant to Rule 36 and Rule 37 of the Federal Rules of Civil Procedure to strike the answer and all subsequent pleadings of the defendant and to enter judgment by default for the plaintiff for the amount prayed for in the complaint upon the grounds and for the following reasons: That plaintiff served interrogatories upon the defendant upon the 12th day of September, 1955, which to date have not been answered, and in addition served request for admissions upon the defendant upon the 12th day of September, 1955, in this matter which to date have not been complied with.

(Argument off the record.)

Mr. Aadnesen: May I suggest at this time that

a stipulation be entered into between counsel that the exhibits be withdrawn. I thought that was understood. We waited yesterday so we could get them back, certainly we would have no objection to that. We could substitute copies in the other case at the request of either counsel.

The Court: If it becomes necessary that could certainly be done. [115]

Mr. Coughlan: I am not stipulating to anything about this thing. I am urging my motion and I want that understood.

The Court: Well, the—under the circumstances I am going to deny your motion provided that the answers to the interrogatories and admissions in the other may be used in this case.

(Argument continued off the record.)

The Court: Your motion, Mr. Coughlan, will be denied with the understanding that it will be worked out. We will take a ten-minute recess. [116]

1:05 P.M.

Mr. Zener: At this time we request permission of the Court to read to the jury certain requests for admissions and the response of the defendant to those admissions.

Mr. Marcus: We interpose an objection to the reading of the requests and response on the ground it is improper primary evidence and reserve our right to object to each specific point.

The Court: Objection overruled, they may be

read. You had better identify them and read them then—better offer them first.

Mr. Zener: At this time we offer in evidence what has been marked for identification as Plaintiff's Exhibit No. 8, being a request for admissions and Plaintiff's Exhibit No. 9 being a response to request for admissions.

Mr. Marcus: We renew our objection.

The Court: Objection overruled. They may be admitted.

Mr. Zener: These are request for admissions in this cause made by the plaintiff, Lanus Wayne Prestidge of the defendant Shell Oil Company "to make [117] the following admissions for the purposes of this action only, and subject to all pertinent objections to admissibility which may be interposed at the trial.

"I.

"That the annexed Exhibit 'A' is a true and correct copy of Designation of Operator filed by you with the Bureau of Land Management in Boise, Idaho." Said Exhibit A reads as follows:——

Mr. Marcus: Now, your Honor, we may be a little bit clumsy with these objections but may it be understood that we object to the reading of each instrument that is submitted in response to the admissions on the ground that the relevancy and competency of such instrument must be shown by the plaintiff before it is submitted in evidence, and that no proper foundation has been made for the admissions.

The Court: Objection overruled. I think the in-

struments themselves speak for themselves. Objection overruled.

Mr. Zener: The Exhibit A referred to reads as follows:

"Exhibit A

"Department of Interior U. S. Geological Survey
Received July 27, 1953 Received July 23, 1953
Bureau of Land Management Casper, Wyoming
Idaho Dist., Land Office, Boise, Idaho
Sppervisor, Oil and Gas Operations: [118]

Designation of Operator

The undersigned is, on the records of the Bureau of Land Management, holder of oil and gas lease.

District Land Office: Idaho, Boise, Idaho.
Serial No: Idaho 045.

and hereby designates

Name: Rocky Mountain Oil Corporation.
Address: 608 Kittredge Building, Denver, Colorado.

as his operator and local agent, with full authority to act in his behalf in complying with the terms of the lease and regulations applicable thereto and on whom the supervisor or his representative may serve written or oral instructions in securing compliance with the Oil and Gas Operating Regulations with respect to (describe acreage to which this designation is applicable):

Township 12 South, Range 46 East, Boise Meridian, Idaho. Section 30: Lot 2.

It is understood that this designation of operator does not relieve the lessee of responsibility for compliance with the terms of the lease and the Oil and Gas Operating Regulations. It is also understood that this designation of operator does not constitute an assignment of any interest in the lease.

In case of default on the part of the designated operator, the lessee will make full and prompt compliance with all regulations, [119] lease terms, or orders of the Secretary of the Interior or his representative.

The lessee agrees promptly to notify the oil and gas supervisor of any change in the designated operator.

SHELL OIL COMPANY,
By S. F. BOWLBY,
By R. PATTON,
Assistant Secretary,
1006 West Sixth Street,
Los Angeles 17, California,
Lessee."

July 20, 1953.
BLM at Boise, Idaho.

Mr. Coughlan: This is the response to request for admissions in the case of Lanus Wayne Prestidge, plaintiff, vs. Shell Oil Company, a corporation, defendant. "The Shell Oil Company, by the undersigned, answering the request for admissions says:

I.

That Exhibit "A," attached to the request for admissions, is a true and correct copy of Designation of Operator filed with the Bureau of Land Management."

Mr. Zener: "II. That on June 2, 1954, Rocky Mountain Oil Corporation operations on Lot 2, Section 30, Tp. 12, SR 46 EBM, were being conducted under Exhibit 'A,' leases, agreements and assignments to be furnished pursuant [120] to Interrogatories 1, 2, 3, 4, 5 & 6 directed to Shell Oil Company."

Mr. Coughlan: The Shell Oil Company, by the undersigned, answering the request for admissions says: "II. That the well drilled by Rocky Mountain Oil Corporation was drilled under the provisions of the Wheeler and Gray agreement."

Mr. Zener: "III. That Exhibit 'B' is a true and correct copy of a letter sent by Shell Oil Company to Rocky Mountain Oil Corporation subsequent to June 2, 1954."

Mr. Marcus: We object to this letter and the admission of this letter in evidence in this matter upon the ground it is incompetent and certainly irrelevant to this case.

The Court: You might read the response to it before you read the letter.

Mr. Coughlan: "III. Admits that Exhibit 'B' is a true and correct copy of a letter from Shell Oil Company to Rocky Mountain Oil Corporation, but was not accepted by Rocky Mountain Oil Corporation."

The Court: Objection sustained as to that exhibit. I can't see how that is material.

Mr. Zener: "That 'Exhibit C' is a true and correct copy of confirmation and assignment executed by Rocky Mountain Oil Corporation at Shell Oil Company's [121] request and delivered to Shell Oil Company subsequent to June 2, 1954."

Mr. Coughlan: The Shell Oil Company, by the undersigned, answering the request for admissions says: "IV. Admits that Exhibit 'C' is a true and correct copy of confirmation and assignment."

Mr. Zener: Exhibit C reads as follows:

"LEK:mm 6/11/54.
Giveout Anticline.
Wheeler-Gray Operating Agreement.

Exhibit 'C'

Confirmation and Assignment

This Agreement, made and entered into this ..... day of ....., 1954, by and between Rocky Mountain Oil Corporation, a corporation (hereinafter referred to as 'Grantor') and Shell Oil Company, a Delaware corporation (hereinafter referred to as 'Shell').

Witnesseth

That, Whereas, pursuant to an Operating Agreement dated December 26, 1952 (hereinafter referred to as 'said Operating Agreement') by and between Shell and Wheeler and Gray, a partnership, predecessor in interest of Grantor, Shell assigned, by Assignment (hereinafter referred to as 'said assignment') dated July 15, 1953, to Grantor United

States Oil and Gas Lease Serial No. Idaho 045 (hereinafter referred to as 'said assigned [122] lease') as to, but only as to, the following described lands (hereinafter referred to as 'said land'), situated in the County of Bear Lake, State of Idaho, to wit:

Township 12 South, Range 46 East, Boise Meridian, Idaho. Section 30: Lot 2;

subject to an overriding royalty of one-half of one per cent (½ of 1%) in favor of Ragnar Barhaug; the segregated portion of said assigned lease covering said land having been assigned Serial No. Idaho 045-A (hereinafter referred to as 'said segregated lease');

And, Whereas, said segregated lease expired by its own terms on February 1, 1954, and Grantor has acquired, by an approved assignment from G. W. Anderson, United States Oil and Gas Lease Idaho 05081, dated May 1, 1954 (hereinafter referred to as 'said lease') the current United States Oil and Gas Lease covering said land; subject, however to an overriding royalty of one-half of one per cent (½ of 1%) in favor of said G. W. Anderson;

And, Whereas, Grantor desires to confirm that said lease is and shall be subject to all the terms and provisions of said Operating Agreement and said assignment, and to the royalties and overriding royalties appertaining to said segregated lease;

Now, Therefore, Grantor hereby confirms and agrees that said lease is and shall be subject to all the terms and provisions of [123] said Operating Agreement and hereby sells, assigns, transfers and

conveys to Shell all royalties and other rights or benefits under said lease by virtue of said assignment; a copy of which is attached hereto and by this reference incorporated herein and made a part hereof, with like effect as if said lease were the lease referred to in said assignment. Grantor further agrees that said lease and the production obtained therefrom is and shall be subject to the overriding royalties hereinabove mentioned, to wit:

(1) One-half of one per cent (½ of 1%) in favor of Ragnar Barhaug, and

(2) One-half of one per cent (½ of 1%) in favor of G. W. Anderson.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first herein written.

ROCKY MOUNTAIN OIL CORPORATION,
By /s/ JOHN J. McINTYRE,
President;
By /s/ JOHN G. OBRECHT,
Secretary."

SHELL OIL COMPANY,
By .....,
Manager, Land Department.

Mr. Zener: "That 'Exhibit D' is a true and correct copy of a letter written to Shell Oil Company by President of Rocky Mountain Oil Corporation on October 11, 1954."

Mr. Coughlan: Shell Oil Company, by the undersigned, answering the request for admissions says: [124]

"V. Admits that Exhibit 'D' is a true and correct copy of the letter written the Shell Oil Company by John J. McIntyre of the Rocky Mountain Oil Corporation.

SHELL OIL COMPANY,
By /s/ JOHN J. MOHR."

(Mr. Coughlan continued reading as follows:)

"State of Idaho,
County of Bannock—ss.

John J. Mohr, being first duly sworn, states that he executed the above admissions for and on behalf of the Shell Oil Company; that said admissions are true as he verily believes.

/s/ JOHN J. MOHR.

Subscribed and Sworn to Before Me this 3rd day of October, 1955.

[Seal] GUS CARR ANDERSON,
Notary Public for Idaho."

Mr. Marcus: I object to the reading in evidence of this letter as it shows on its face that it could have no materiality to this particular case.

Mr. Zener: I think we will have to agree to that.

The Court: Objection sustained.

Mr. Zener: At this time we desire to read into the record the interrogatories by plaintiff [125] addressed to Shell Oil Company in this cause, and the answers to the interrogatories.

Mr. Marcus: To which we object as being im-

proper and no proper foundation having been laid for them.

The Court: Is the witness or person that answered the interrogatories present?

Mr. Zener: No, I am advised that the person answering is not.

The Court: Is it agreed that the person answering the interrogatories is not present and available to testify.

Mr. Marcus: Your Honor, the person is not present and it is Mr. Mohr.

The Court: The interrogatories and the responses thereto may be read. [126]

(Mr. Zener and Mr. Coughlan then read the interrogatories and answers to the interrogatories into the record.)

Mr. Zener: "You are hereby notified to answer under oath the interrogatories numbered 1 to 50 as shown below within 15 days of the time of service is made upon you, in accordance with Rule 33 of Federal Rules of Civil Procedure. 1. Furnish true copy of U. S. Oil & Gas Lease Idaho 045 between you and Federal Bureau of Land Management."

Mr. Coughlan: Answer to interrogatory: "State of Idaho—County of Bannock, ss. John Mohr, being duly sworn, deposes and says: I am the District Land Manager for Shell Oil Company, defendant in the above action, and agent of that corporation, for the purpose of answering the interrogatories of Plaintiff. I have read the interrogatories and the

following answers are true according to the best of my knowledge, information and belief:

1. "Copy of U. S. Oil & Gas Lease Idaho 045 submitted."

Mr. Zener: "Furnish true copy of Agreement dated the 26th day of December, 1952, and exhibits attached thereto, between you and Wheeler and Gray pertaining to Lot 2, Section 30, Tp. 12, SR 46 EBM."

Mr. Coughlan: "2. Copy of Wheeler and Gray Agreement of December 26, 1952, submitted."

Mr. Zener: "3. Furnish true copy of Assignment from Wheeler and Gray to Mountain Oil Corporation executed March 6, 1953." [127]

Mr. Coughlan: "3. Copy of Assignment from Wheeler and Gray to Rocky Mountain Oil Corporation submitted."

Mr. Zener: "4. Furnish true copy of consent by you to the Assignment referred to in Interrogatory No. 3 executed August 7, 1953, by S. F. Bowlby."

Mr. Coughlan: "4. Copy of consent submitted."

Mr. Zener: "5. Furnish true copy of Partial Assignment of Oil & Gas Lease between you and Rocky Mountain Oil Corporation executed July 15, 1953, pertaining to Lot 2, Section 30, Tp. 12, SR 46 EBM."

Mr. Coughlan: "5. Copy of Partial Assignment from Shell Oil Company to Rocky Mountain Oil Corporation submitted."

Mr. Zener: "6. Furnish true copy of confirmation and assignment as to above Agreements and

property dated on or about June 11, 1954, between you and Rocky Mountain Oil Corporation."

Mr. Coughlan: "6. Copy of confirmation and assignment of June 11, 1954, submitted."

Mr. Zener: "7. Did you do geological and title work on lands in connection with U. S. Oil & Gas Lease Idaho 045, and was the expense in connection therewith paid by you?"

Mr. Marcus: May we have just a moment, perhaps we can shorten our objections to avoid objecting to each one of the questions. We object to each one of the question following No. 7 through question number 50 upon the ground and for the reason that such questions and answers are irrelevant and immaterial as being [128] specific provisions contained in the drilling contract referred to commonly as the Wheeler and Gray agreement.

The Court: I will have to rule on them as I come to the question. May it be understood the objection runs to all those questions?

Mr. Zener: Yes.

The Court: Objection overruled as to 7.

Mr. Coughlan: "7. Yes. Prior to Wheeler and Gray Agreement."

Mr. Zener: "8. Was geological data and title data furnished by you to Rocky Mountain Oil Corporation concerning U. S. Oil and Gas Lease Idaho 045?"

Mr. Coughlan: "8. Such data was furnished as provided in Wheeler and Gray Agreement."

Mr. Zener: "9. Did you on June 2, 1954, own

leases to properties adjacent to Lot 2, Section 30, Tp. 12, SR 46 EBM, upon which the oil well was drilled by Rocky Mountain Oil Corporation?"

Mr. Coughlan: "9. Yes."

Mr. Zener: "10. Please attach plat showing location of land assigned to Rocky Mountain Oil Corporation under partial assignment of lease and adjacent properties held by you."

Mr. Coughlan: "10. Plat is attached."

Mr. Zener: "II. Did you require that the drilling of the oil well commence prior to June 26, 1953?"

Mr. Coughlan: "II. Assuming this question refers to the [129] well on Lot Two, Section 30, the Wheeler and Gray Agreement provided such well was to be started by June 26, 1953."

Mr. Zener: "12. Did you fix the location of the well?"

Mr. Coughlan: "12. The location was provided under the terms of the Wheeler and Gray Agreement."

Mr. Zener: "13. Did you require the well to be drilled to a certain depth?"

Mr. Coughlan: "13. Well required to be drilled to a certain depth under the Wheeler and Gray Agreement."

Mr. Zener: "14. (a) Was there a time limit with which the well was to be drilled. (b) What was that?"

Mr. Coughlan: "14. The time limit was fixed in the Wheeler and Gray agreement; said well to be prosecuted to completion after starting."

Mr. Zener: "15. (a) Did you grant extensions of time for completion of drilling the well to Rocky Mountain Oil Corporation? (b) If so, how many? (c) When were they given?"

Mr. Coughlan: "15. No."

Mr. Zener: "16. (a) Please state the names of your officials, employees or representatives on the premises at the oil well during the drilling operation by Rocky Mountain Oil Corporation. (b) State their duties and how long they remained upon the premises. (c) Did your geologist take daily samples during the drilling by Rocky Mountain Oil Corporation?" [130]

Mr. Coughlan: "16. a. Mr. Loren McIntyre, geologist, was at property on June 2, 1954, to inquire about samples:

b. His duty was to collect samples for Shell Oil Company: remained on premises only long enough to get such samples;

c. Collected samples daily during actual drilling."

Mr. Zener: "17. Was this well drilled in order to give you a test for the adjacent properties held by you?"

Mr. Coughlan: "17. The well was drilled to test the assigned lease property and to obtain information which the well might reveal."

Mr. Zener: "18. Does Rocky Mountain Oil Corporation owe you for rentals paid by you on their behalf on lands covered by U. S. Oil & Gas Lease Idaho 045?"

Mr. Coughlan: "18. No."

Mr. Zener: "19. Was Rocky Mountain Oil Corporation required to make tests on the well and satisfactory to you upon your request?"

Mr. Coughlan: "19. Only as provided in the Wheeler and Gray contract."

Mr. Zener: "20. Were you, under your Agreement with Rocky Mountain Oil Corporation, to have full access to the well and records concerning the drilling of the well?"

Mr. Coughlan: "20. Yes. As provided in the Wheeler and Gray contract."

Mr. Zener: "21. Was a requirement of yours that in the event oil or gas showed during the drilling by Rocky Mountain Oil [131] Corporation they were to cease drilling?"

Mr. Coughlan: "21. To stop drilling only temporarily until parties could observe testing."

Mr. Zener: "22. Was it your requirement and agreement with Rocky Mountain Oil Corporation that your representatives were to be present at the testing of the well?"

Mr. Coughlan: "22. The contract granted our representatives the opportunity to be present at the testing."

Mr. Zener: "23. Was Rocky Mountain Oil Corporation to furnish you drill cuttings at 10-foot intervals from 2,500 feet on?"

Mr. Coughlan: "23. Yes. As provided in the Wheeler and Gray contract."

Mr. Zener: "24. Was Rocky Mountain Oil Corporation to furnish you will all drilling information

samples and a day-to-day drilling report during the drilling of the well?"

Mr. Coughlan: "24. As provided in the Wheeler and Gray contract."

Mr. Zener: "25. Was Rocky Mountain Oil Corporation required to furnish you with a certified copy of the complete log upon the completion of the well?"

Mr. Coughlan: "25. Yes, under the terms of the contract."

Mr. Zener: "26. Was it not a requirement that prior to the plugging of the well and after its competition, a representative of yours was to determine if the proper depth was reached?" [132]

Mr. Coughlan: "26. Contract required proof that well had been drilled to depth provided; the dry-hole money was to be paid as provided in contract."

Mr. Zener: "27. Did you have a right to request steel line measurements to be made in the presence of your representatives, said steel line measurement to be made by Rocky Mountain Oil Corporation?"

Mr. Coughlan: "27. Our representatives had the right to check to determine if well was drilled to the depth required by contract."

Mr. Zener: "28. Was Rocky Mountain Oil Corporation to furnish you with a Schlumberger Log?"

Mr. Coughlan: "28. Yes."

Mr. Zener: "29. Was it not an agreement that the well could not be plugged until 24 hours after the delivery of the Schlumberger Log to you?"

Mr. Coughlan: "29. Yes."

Mr. Zener: "30. Was not Rocky Mountain Oil Corporation to make tests of showings if you so requested?"

Mr. Coughlan: "30. Yes."

Mr. Zener: "31. Was it not the agreement between you and Rocky Mountain Oil Corporation that there were to be no liens permitted upon the well or premises which would jeopardize your over-riding royalty?"

Mr. Coughlan: "31. Yes." [133]

Mr. Zener: "32. Was it not a further agreement that there could be no abandonment of the oil well without 15 days' notice to you?"

Mr. Coughlan: "32. Yes."

Mr. Zener: "33. Was not Shell Oil Company to have the right to make tests at its own expense within the 15-day period prior to an abandonment?"

Mr. Coughlan: "33. Yes."

Mr. Zener: "34. Could not Shell Oil elect to take over the well and have the premises reassigned to it free and clear of all encumbrances in the event of an abandonment?"

Mr. Coughlan: "34. Yes."

Mr. Zener: "35. What was the agreement in the event that Shell Oil Company should take over the well with respect to reimbursing Rocky Mountain Oil Corporation for salvage value and other costs?"

Mr. Coughlan: "35. As provided in the Wheeler and Gray Agreement."

Mr. Zener: "36. Please state to what exent you

would share in the losses of the venture in the event oil was not obtained?"

Mr. Coughlan: "36. Our company did not share in the losses of the venture."

Mr. Zener: "37. How much per foot were you to pay toward the cost of the well in the event of a dry hole?" [134]

Mr. Coughlan: "37. If well drilled to required depth contract obligation to pay fixed amount, depending on footage, not to exceed $8,250."

Mr. Zener: "38. What consideration was to be paid to Rocky Mountain Oil Corporation by you in the way of assignment of acreage for drilling this well?"

Mr. Coughlan: "38. As provided in the Wheeler and Gray Agreement."

Mr. Zener: "39. Who was to pay the rentals on this acreage? (a) Did you pay rentals on this? (b) Does Rocky Mountain Oil Corporation owe you now for the rentals?"

Mr. Coughlan: "39. a. Shell Oil Company to pay rentals and to be reimbursed; b. No."

Mr. Zener: "40. Please state to what extent Shell Oil Company would participate in the profits in the event the drilling turned out to be a producing well."

Mr. Coughlan: "40. Shell Oil Company would not participate in profits, only entitled to contract over-riding royalty."

Mr. Zener: "41. Was not Shell Oil Company frequently consulted in connection with the drilling of this oil well?"

Mr. Coughlan: "29. Yes."

Mr. Zener: "30. Was not Rocky Mountain Oil Corporation to make tests of showings if you so requested?"

Mr. Coughlan: "30. Yes."

Mr. Zener: "31. Was it not the agreement between you and Rocky Mountain Oil Corporation that there were to be no liens permitted upon the well or premises which would jeopardize your over-riding royalty?"

Mr. Coughlan: "31. Yes." [133]

Mr. Zener: "32. Was it not a further agreement that there could be no abandonment of the oil well without 15 days' notice to you?"

Mr. Coughlan: "32. Yes."

Mr. Zener: "33. Was not Shell Oil Company to have the right to make tests at its own expense within the 15-day period prior to an abandonment?"

Mr. Coughlan: "33. Yes."

Mr. Zener: "34. Could not Shell Oil elect to take over the well and have the premises reassigned to it free and clear of all encumbrances in the event of an abandonment?"

Mr. Coughlan: "34. Yes."

Mr. Zener: "35. What was the agreement in the event that Shell Oil Company should take over the well with respect to reimbursing Rocky Mountain Oil Corporation for salvage value and other costs?"

Mr. Coughlan: "35. As provided in the Wheeler and Gray Agreement."

Mr. Zener: "36. Please state to what exent you

would share in the losses of the venture in the event oil was not obtained?"

Mr. Coughlan: "36. Our company did not share in the losses of the venture."

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Mr. Coughlan: "40. Shell Oil Company would not participate in profits, only entitled to contract over-riding royalty."

Mr. Zener: "41. Was not Shell Oil Company frequently consulted in connection with the drilling of this oil well?"

Mr. Coughlan: "41. No."

Mr. Zener: "42. If the well were a producer, then was Rocky Mountain Oil Corporation required to drill three more wells within not more than three months' time interval between the drilling of wells?" [135]

Mr. Coughlan: "42. No."

Mr. Zener: "43. Was it not true that the Lease Agreement or any of the production of the well could not be assigned first without the consent of Shell Oil Company?"

Mr. Coughlan: "43. No. Shell Oil Company had right of first refusal."

Mr. Zener: "44. Were you not entitled to take all the production of the well should you so desire?"

Mr. Coughlan: "44. Shell Oil Company had the right to buy production."

Mr. Zener: "45. Was it not the agreement that the lease under which Rocky Mountain Oil Corporation operated could not be surrendered without first offering it to Shell Oil Company?"

Mr. Coughlan: "45. Yes."

Mr. Zener: "46. Was it not a requirement that in the event an assignment was made by Rocky Mountain Oil Corporation it was to be subject to the agreement between Rocky Mountain Oil Corporation and Shell Oil Company?"

Mr. Coughlan: "46. Yes."

Mr. Zener: "47. Was it not the agreement that in any event an assignment could not be made for financing by Rocky Mountain Oil Corporation until the well was completely drilled?"

Mr. Coughlan: "47. Under contract the Rocky Mountain Oil Corporation had the right to assign a certain percentage of production." [136]

Mr. Zener: "48. Were not the operations being carried out on June 2, 1954, at the well site pursuant to your agreements previously made with Rocky Mountain Oil Corporation?"

Mr. Coughlan: "48. The well was being drilled under the provisions of the Wheeler and Gray agreement."

Mr. Zener: "49. On June 2, 1954, did you not have other agreements and arrangements with Rocky Mountain Oil Corporation for the drilling of wells in Wyoming, Utah and other states?"

Mr. Coughlan: "49. No."

Mr. Zener: "50. Did you subsequent to June 2, 1954, pay the dry hole money provided for in the Contract in connection with the drilling of this well?"

Mr. Coughlan: "50. The dry hole money was paid as provided in the Wheeler and Gray agreement."

Signed "John E. Mohr."

"Subscribed and sworn to before me this 3rd day of October, 1955."

"GUS CARR ANDERSON,
Notary Public for Idaho."

Mr. Zener: At this time we offer in evidence Plaintiff's Exhibit 10, the oil and gas lease referred to here as the Barhaugh lease.

Mr. Marcus: No objection.

The Court: Exhibit 10 may be admitted.

Mr. Zener: We offer in evidence what has been marked for identification as Plaintiff's Exhibit 11, what is referred to [137] as the Wheeler-Gray Agreement.

Mr. Marcus: No objection.

The Court: It may be admitted.

Mr. Zener: We offer what has been marked for identification as Plaintiff's Exhibit 12 entitled "Assignment" with attached "Consent."

Mr. Marcus: No objection.

The Court: It may be admitted.

Mr. Zener: We offer in evidence what has been marked as Plaintiff's Exhibit 13, designated as "Partial Assignment of Oil and Gas Lease."

Mr. Marcus: No objection.

The Court: May be admitted.

Mr. Zener: We offer what has been marked as Plaintiff's Exhibit No. 14, being a plat.

Mr. Marcus: Object to that as being irrelevant and immaterial.

The Court: It may be admitted. Objection overruled.

Mr. Zener: At this time we would like permission of the Court to read one of the exhibits to the jury. We would like to read the Wheeler and Gray Agreement.

The Court: Very well, you are entitled to read it.

Mr. Marcus: Won't these be given to the jury?

The Court: Yes; they will and either party may refer to them.

Mr. Coughlan: (Read the following portion of Exhibit 11 to the jury:) [138]

"This Agreement, made and entered into this 26th day of December, 1952, by and between Wheeler and Gray, a partnership consisting of Bert Wheeler and Lloyd Gray (hereinafter called 'Wheeler and Gray'), and Shell Oil Company, a Delaware Corporation (hereinafter called 'Shell');

"Witnesseth

"That, Whereas, Shell is the owner and holder of certain oil and gas leases covering property in Bear Lake County, Idaho, said leases and certain portions of the lands covered thereby (sic) being particularly described in Exhibit 'A' attached hereto and hereby made a part hereof, and hereinafter called 'said lease' and 'said lands' respectively;

"And whereas, Shell has agreed, conditioned upon the performance by Wheeler and Gray of the covenants and agreements hereinafter contained, to assign to Wheeler and Gray said leases as to, but only as to, said lands;

"Now Therefore, in consideration of the premises and of the respective agreements hereinafter set forth, it is mutually agreed by and between Shell and Wheeler and Gray as follows, to wit:

"1. Shell makes no warranty whatsoever as to the validity of said leases as to said lands or the title thereto. Shell does, however, state that it has not transferred, conveyed or encumbered any interest in said leases as to said lands or any interest in said substances which may be produced thereunder. [139]

"2. Concurrently with the date hereof Shell is

lending Wheeler and Gray for a reasonable period of time all title data which Shell has pertaining to said lands. It is expressly understood that the furnishing of such data to Wheeler and Gray as aforesaid is solely for Wheeler and Gray's convenience and Shell makes no representation to Wheeler and Gray relative to the contents or accuracy of any thereof. Wheeler and Gray shall have sixty (60) days from the date hereof in which to make such investigation in connection with the title to said lands and said leases as it desires. Failure of Wheeler and Gray to give Shell written notice within said 60-day period setting forth specific objections to title to said lands or said leases will be deemed an acceptance of title by Wheeler and Gray. The parties hereto shall have thirty (30) days after the giving of any such notice setting forth objections to title within which period to attempt to cure any requirements affecting title. If the parties are unable within the 30-day period to cure any such requirements so made, Wheeler and Gray may nevertheless elect to waive them, but in any event Wheeler and Gray shall be required to accept or reject title as to all of said lands in writing within five (5) days after the expiration of said 30-day period. Failure of Wheeler and Gray to give Shell written notice of rejection of title within five (5) days following the expiration of said 30-day period will likewise be deemed an acceptance of title by Wheeler and Gray. In the event of [140] rejection of title as aforesaid, this agreement shall thereupon terminate without any liability whatsoever on the

part of either party hereto. In the event of acceptance of title as aforesaid, Shell thereupon shall execute and deliver to Wheeler and Gray an assignment in the form of Exhibit B attached hereto and hereby made a part hereof, of all its right, title, interest and estate in and to Lot 2 of Section 30, Township 12 South, Range 46 East, Boise Meridian, Idaho.

"3. On or before June 26, 1953, Wheeler and Gray shall commence the drilling of a test well (hereinafter called 'test well') at a location in the approximate center of said Lot 2, and shall thereafter prosecute the drilling of the test well to 'completion,' i.e., until (a) it is drilled to a vertical depth of 5,000 feet below the surface, or (b) it is drilled to a depth sufficient to test the Nugget formation to the satisfaction of Shell or (c) the parties hereto shall determine that further drilling therein would not be warranted, whichever first occurs.

"4. Tests satisfactory to Shell shall be made by Wheeler and Gray of all possible producing horizons in the test wall. In the event any showing or showings of oil or gas are encountered, Wheeler and Gray shall cease drilling and at once notify Shell at its office at Casper, Wyoming, so that Shell may have a representative present to witness the testing of any such showing. Shell's representatives shall have full and complete access to the well and drilling records at all times. Drilling operations [141] shall be so conducted that at all times satisfactory samples of drill cuttings are obtained by Wheeler and Gray for Shell at 10-foot intervals from 2500 feet

to total depth. The upper 50 feet of the Nugget formation shall be cored by Wheeler and Gray and, in the event that oil staining is encountered, Wheeler and Gray shall take further cores of such formation so long as oil staining persists. Wheeler and Gray shall furnish Shell any and all drilling information and samples of all formations, including cores, and upon request samples of any fluids encountered in the drilling of said well. Wheeler and Gray shall furnish daily to Shell's office at Casper, Wyoming, a drilling report giving formations encountered, and accurate depths of same for the previous day's drilling, and, upon completion of the well, a certified copy of the complete log. Shell shall be provided with copies of any logs which may be run, such as radioactivity logs, caliper surveys, mud logs, etc. If the test well is dry, and before plugging is commenced, Wheeler and Gray will notify Shell at its office at Casper, Wyoming, in sufficient time to permit representatives of Shell to determine whether the test well has reached the required depth, and, should Shell request, a steel line measurement of the hole must be taken in the presence of representatives of Shell. Shell shall be furnished with a Schlumberger log, or other electrical log acceptable to Shell, on conventional scale, of the test well to its greatest depth. Wheeler and Gray shall [142] not plug the test well until twenty-four (24) hours after delivery of said log, the delivery to be made during regular business hours. If any of such Schlumberger surveys, in Shell's opinion, should indicate a show-

ing of oil or gas, Wheeler and Gray shall make an adequate test of such showing.

"5. Any and all costs of any nature whatsoever incurred by Wheeler and Gray in conducting operations hereunder or under said leases as to said lands shall be borne, except as provided in Article 7 herein, entirely by Wheeler and Gray and shall be entirely free of cost to Shell. Wheeler and Gray shall pay all bills promptly, and shall not permit any liens to accrue against the leasehold estate covering Lots 1 and 2, and the E½NW¼ of Section 30, Township 12 South, Range 46 East, Boise Meridian, Idaho, or any equipment used in connection therewith that would in any manner jeopardize Shell's overriding royalty share as set forth in Exhibit B hereof, or rights hereunder.

"6. The test well shall not be abandoned by Wheeler and Gray without fifteen (15) days' prior written notice thereof to Shell. At any time within said fifteen-day period Shell may, at its own cost and expense, make tests of any nature in such well; and at any time within said fifteen-day period Shell may elect to take over such well and receive from Wheeler and Gray a reassignment of the United States Oil and Gas Lease with respect to said Lot 2 free and clear of any encumbrances or other obligation whatsoever incurred by Wheeler [143] and Gray. Shell shall reimburse Wheeler and Gray for any extra expense incurred by Wheeler and Gray by reason of any exercise of the right to make tests herein given to Shell. Upon taking over any such well, Shell shall pay Wheeler and Gray the net

salvage value of any recoverable property and equipment of Wheeler and Gray therein or thereon, less the reasonable cost of plugging such well. 'Net salvage value' shall mean the then market value of such recoverable property and equipment on the ground at the well, less the reasonable cost of recovering same.

"7. In the event the test well is drilled to completion and is abandoned as a dry hole, Shell agrees thereupon to pay to Wheeler and Gray the sum of One and 50/100 Dollars ($1.50) per foot for the first 3,500 feet and Two Dollars ($2.00) per foot for the next 1,500 feet with respect to the depth to which the test well is drilled. In no event shall the total sum to be paid by Shell exceed Eight Thousand Two Hundred Fifty Dollars ($8,250.00) dry-hole money.

"8. Upon compliance by Wheeler and Gray with all of its obligations under Articles 3 and 4 hereof, Shell thereupon shall execute and deliver to Wheeler and Gray assignments of all its right, title, interest and estate in and to said leases as to, but only as to, said lands. The assignment with respect to Lot 1 and the E½NW¼ of Section 30 in Township 12 South, Range 46 East, Boise Meridian, Idaho, shall be in the form of said Exhibit B. The assignments with respect to the balance of said lands shall be in the form of Exhibit C attached hereto and hereby made a part hereof. Until such time as the [144] assignments of said lands are made, Shell shall promptly pay the rentals which may accrue with respect to said lands to be assigned and Wheeler and

Gray shall promptly reimburse Shell for any rentals so paid by Shell.

"9. In the event said test well is completed as a well capable of producing oil in paying quantities (i.e., quantities sufficient to repay the cost of drilling and operating the test well plus a reasonable profit), then Wheeler and Gray shall thereafter keep one string of tools in continuous operation allowing not more than six months between completion of one well and the commencement of drilling of the next succeeding well until there shall have been completed in the same zone in which the test well was completed at least one well on each of the following parcels in Section 30, Township 12 South, Range 46 East, Boise Meridian, Idaho: Parcel 1—Lot 1; Parcel 2—NE¼NW¼; Parcel 3—SE¼NW¼.

"10. Wheeler and Gray shall not have the right to assign or transfer any right or obligation under this agreement without the prior written consent of Shell. The consent by Shell with respect to any such assignment or transfer shall not operate or be construed as a waiver with respect to any other or subsequent assignments or transfers.

"11. Any notice or instrument herein provided to be given or delivered by either party to the other (except when otherwise specified herein) may be given by delivering the same in person or by depositing the same in any United States Post [145] Office, registered, postage prepaid, addressed as follows:

"To Wheeler and Gray, c/o Bert Wheeler, 666 Vista Lane, Lakewood, Colorado;

"To Shell at 1008 West Sixth Street, Los Angeles 17, California, or at such other address as may be designated by similar notice. Any such notice or instrument shall be deemed to have been received by the party to whom the same is addressed at the expiration of forty-eight (48) hours after the deposit of the same in the United States Post Office for transmission by registered mail as aforesaid.

"12. The terms, provisions and conditions of this agreement shall bind and inure to the benefit of the respective heirs, executors, administrators, successors and assigns of the parties hereto.

"In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.

"WHEELER AND GRAY;

"By /s/ BERT WHEELER,

"By /s/ LLOYD GRAY.

"SHELL OIL COMPANY;

"By /s/ S. F. BOWLBY,

"Vice President." [146]

Mr. Zener: I believe there is only one other matter. That is the matter of stipulating between counsel that the Barhaugh lease which has been introduced in evidence as Exhibit No. 10 was acquired by Shell Oil Company after the date of the execution.

Mr. Marcus: Yes; that is stipulated.

Mr. Zener: The plaintiff rests.

The Court: Ladies and Gentlemen of the Jury, we will recess until 2:00 p.m.

(Jury duly excused.)

The Court: You may now renew your motion if you so desire. Is it understood the record will show your motion?

Mr. Marcus: Yes, your Honor; with special emphasis in line with the evidence which has been introduced by the plaintiff in this case in addition to the grounds stated in the Wuthrick case.

The Court: All right.

Mr. Marcus: Comes now the Shell Oil Company, the defendant in this action and moves the involuntary dismissal of the action and complaint of the plaintiff upon the ground and for the reasons that it is shown here by the evidence that this oil well drilling was being performed by the Rocky Mountain Oil Corporation, a corporation which is entirely separate and distinct and totally unrelated to the Shell Oil [147] Company, this defendant, and that under the terms of the contract which is admitted in evidence here, the Rocky Mountain Oil Corporation was an independent contractor in the performance of this work and that the Shell Oil Company was in no way responsible for the acts of negligence, if any, of the Mr. Doman who is allegedly the person who caused this unfortunate occurrence. As a further ground, your Honor, the evidence shows clearly that at the particular time of this occurrence the Shell Oil Company had nothing to do with this work. There was nobody, no representative of Shell

who was present or participating in the work that was going on at the particular time of this occurrence, and the principle is very clear that in order to render a person liable for injuries under the doctrine of respondent superior, the relationship of master and servant must be shown to have existed between the wrongdoer and the person sought to be charged at the time of the injury, and in reference to the very act complained of. Here the evidence shows that even the geologist who was there to obtain the geological information had nothing to do with the work until subsequent to the time of this occurrence, so the entire question here is based upon the contract arrangement between Shell and the Rocky Mountain Oil Corporation, and it is up to the Court to determine what the relationship was that existed. It is our position, your Honor, that clearly there was an independent contract relationship here, and for that reason we move the dismissal of the action and move for a nonsuit on behalf of this defendant. [148]

The Court: The record may show the motion is denied.

Mr. Zener: I think we can state for the purpose of the record that it has been agreed between counsel and the Court that certain exhibits heretofore introduced in evidence in the Wuthrick case may be withdrawn from that case. They are designated in the Wuthrick case as exhibits 8 through 13.

Mr. Aadnesen: We will stipulate as to all of them, of course without waiving our objection as to admissibility if any was made.

The Court: We will now recess.

2:00 P.M.

The Court: You may proceed with the defendant's case.

(Mr. Marcus made his opening statement.)

Mr. Marcus: Your Honor, we would offer in evidence what is marked Defendant's Exhibit 15, being a certified copy of a lease, oil and gas lease issued to G. W. Anderson on April 29, 1954.

Mr. Zener: We object only on the ground the exhibit is immaterial and irrelevant.

The Court: It may be admitted. [149]

LOREN McINTYRE

having been previously sworn, testified as follows, upon

Direct Examination

By Mr. Marcus:

Q. Mr. McIntyre, you testified in this case here this morning, did you not? A. Yes; I did.

Q. Now, calling your attention to the morning of June 1, 1954, about what time did you get out to the drilling site? A. About six that morning.

Q. Did you know the individuals who were present at that time? A. No; I did not.

Q. Were there some individuals around there at that time?

A. I beg your pardon, on the other question I knew Mr. Robinson but I did not see him that morning as he was asleep in the truck.

Q. When you arrived out there was the fire

(Testimony of Loren McIntyre.)

burning in the barrel? A. Yes; it was.

Q. And did it continue? Did they keep the fire going until Mr. Wuthrick and Prestidge came up to the fire? A. They did.

Q. Now, where were you standing at the time Mr. Wuthrick and Mr. Prestidge came up [150] there? A. I was standing beside the fire.

Q. Do you know the employee of the Rocky Mountain Oil Corporation who later poured the diesel on the fire? A. I did not.

Q. Where was he standing at the time that you went up there?

A. I believe he was not near the fire but over by the rig some place.

Q. Later did he approach the fire and stand by it? A. Yes; he did.

Q. Where were you standing when Mr. Wuthrick and Mr. Prestidge came up to the fire?

A. By the fire.

Q. Was it quite cold that morning?

A. It was.

Q. And did you observe the employee of the Rocky Mountain Oil Corporation pour the diesel on the fire? A. Yes; I did.

Q. At the time the accident occurred?

A. Yes.

Q. Now, where were you standing at that time?

A. I was standing beside the fire, between the fire and the rig.

Q. And where were Mr. Prestidge and Wuthrick?

(Testimony of Loren McIntyre.)

A. They were on the opposite side of the fire.

Q. And did they remain there until the diesel was poured [151] on the fire?

A. Yes; they did.

Q. Both of them remained on the opposite side of the fire? A. Yes.

Q. And how close to the fire were they?

A. Two or two and a half feet.

Q. Did either of them move back or walk away from that place as Mr. Doman, the employee of Rocky Mountain——

Mr. Zener: Would you please not lead the witness? I object to the last question.

The Court: Objection sustained.

Q. Can you tell the court and jury what happened and where Mr. Prestidge and Mr. Wuthrick were standing up to the time this accident occurred?

A. They were standing on the opposite side of the fire from myself—what was the entire question?

(Reporter read the pending question.)

A. They were standing on the opposite side of the fire and just directly across from it, about two or two and a half feet from the fire.

Q. Did they at any time change their positions up to the time of this actual occurrence?

A. No.

Q. And they remained standing within two or two and a half feet of the fire? [152]

Mr. Zener: I object on the ground these questions are all leading.

(Testimony of Loren McIntyre.)

The Court: Yes; they are. Objection sustained.

Q. Do you know whether or not Mr. Wuthrick and Mr. Prestidge observed Mr. Doman as he poured the diesel on the fire?

Mr. Zener: Object on the ground it could not be within this man's knowledge.

The Court: Objection sustained.

Q. In what direction were they looking at the time the diesel was poured?

A. Across the fire at myself and Mr. Doman.

Q. Did either of them at any time object to——

A. No; they did not.

Q. To the action of Mr. Doman?

A. No; they did not.

Cross-Examination

By Mr. Zener:

Q. You did see Mr. Prestidge struck with the flame or catch on fire there; didn't you?

A. At the time of the explosion I turned around and stepped away from the fire and the next time I saw Mr. Prestidge is when he ran by.

Q. Then you don't know just where he was standing at the time of the explosion; is that [153] right?

A. The time they poured the oil he was standing directly across.

Q. What did Mr. Prestidge do after this explosion?

A. As I say, the next time I saw him was when

(Testimony of Loren McIntyre.)

he ran by and Mr. Doman then tackled him and threw him to the ground.

Q. How did he appear when you saw him running by you? A. He was on fire.

Q. He was on fire almost from head to foot, wasn't he?

A. Well, his lower extremities he—were on fire. I wouldn't say to the extent.

Q. He seemed to be in panic to you?

A. Yes; he appeared that way; yes.

Q. What did this man Doman have to do in order to stop him?

A. He grabbed ahold of him and wrestled him to the ground.

Q. What did he do then?

A. He proceeded to smother the fire.

Q. Did you observe Mr. Prestidge after the fire was smothered?

A. I saw him for a few seconds while they were putting him in the car; yes.

Q. Did you observe hs body and the extent of his burns?

A. He had his clothing on and it was difficult to say.

Q. Was his clothing burned to any extent?

A. Charred around the ankles and wrist. [154]

Q. How about around his knees?

A. Well, his pants covered his knees so I couldn't tell.

Q. Wasn't charred around his knees?

(Testimony of Loren McIntyre.)

A. Not that I observed.

Q. How about his hands, wrist and face; did you observe anything about those?

A. I didn't look quite that close. As I say, they were charred around the edge of his clothing.

Q. Did he appear to be in pain?

A. Well, yes.

Q. Did he cry out?

A. A—not at that time; no.

Q. Did he at any time?

A. Well, when he went by the first when he was on fire, yes; he was crying out.

Q. After the fire had been extinguished and they loaded him in this vehicle did he say anything then?

A. Well, I wasn't that close.

Q. How far would you say this Mr. Doman threw or poured this diesel oil into this open fire, was there some distance between him and the fire?

A. No; not too much.

Q. Did it concern you when you saw he was going to throw this oil in an open fire?

A. As he was doing it; yes. I thought he was going to pour it in an open can as he did previously when he first picked up the closed can. [155]

Q. Did you step back; were you alarmed or concerned?

A. There wasn't quite that much time.

Q. I take it you acted rather rapid when he did this?

A. He had the open can close to the fire, the open can, and he went and picked up the closed can

(Testimony of Loren McIntyre.)

which he had been pouring the oil in the open can and came up to the fire and instead of pouring it in the open can he poured it from the closed can upon the fire.

Q. It caused an almost immediate explosion?

A. Fairly soon.

Q. Covering some considerable area immediately around that fire?

A. Well, I couldn't verify what area it covered because I turned around and stepped out away from the fire.

Q. Did you hear anything that would denote an explosion or any sound?

A. Yes; there was a low explosion.

Mr. Zener: That is all.

Mr. Marcus: That is all. We rest, your Honor.

Mr. Zener We have no rebuttal.

The Court: I will excuse the jury for a few moments.

(Jury duly excused.)

Mr. Marcus: May the record at this point show our motions for dismissal and for directed verdict as in the Wuthrick case? [156]

The Court: Yes.

Mr. Marcus: Your Honor, comes now the defendant, Shell Oil Company, and moves that the action and the complaint of the plaintiff against the Shell Oil Company herein be dismissed upon the ground and for the following reasons: That the evidence now shows that Shell Oil Company is in no way

legally responsible and liable for the accident to Mr. Prestidge and the resulting injuries and was not and is not legally responsible and liable for any acts of negligence, if there were any, of Mr. Doman referred to in the testimony. That the evidence shows that the well and the work at the time of this accident was being carried on by the Rocky Mountain Oil Corporation under an independent contract, and was acting in the capacity of an independent contractor in the performance of such oil well drilling and the related work. That the evidence shows without contradiction that Shell Oil Company did not bear the relationship of principal to the Rocky Mountain Oil Corporation or to the said employee of Rocky Mountain Oil Corporation at the time of such occurrence. Upon the further ground that the evidence shows that the relationship of these parties, Rocky Mountain Oil Corporation and the Shell Oil Company must be determined from the written instrument in evidence here and that those instruments show that the Shell Oil Company and Rocky Mountain Oil Corporation were not principal and agent, master or servant, and were not engaged in a joint adventure at that [157] particular time.

Upon all such grounds we also move that the Court, under Rule 50, direct a verdict in behalf of the Shell Oil Company and against the plaintiff, both motions being based upon the further ground, your Honor, that the evidence in this action shows as a matter of law that if there was negligence on the part of the employee mentioned, the plaintiff was also guilty of contributory negligence.

The Court: I am going to deny the motion to dismiss and reserve my decision on the directed verdict.

(A recess was then taken.)

2:30 P.M.

(The case was then argued by the respective parties.)

(The Court then instructed the jury as follows:)

INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

You have listened intently to the evidence and the argument of counsel in this case, and if I may have your attention for a short time I will advise you as to the principles of law applicable in this matter, by which you must be guided in your deliberations. It is your duty to accept these instructions as correct and, so far as the law in the case is concerned, to be guided by them. It is the Court's responsibility to decide all questions of law. It is likewise your responsibility to decide all questions of fact, and the Court cannot be of assistance to you in that [158] regard.

In this action the plaintiff seeks to recover the sum of $1,800 as special damages and the sum of $100,000 as general damages. The plaintiff alleges in his complaint that on or about June 2, 1954, defendant Shell Oil Company was engaged in oil well

drilling operations near Montpelier, Idaho; that on the said date he was on the defendant's premises at the latter's invitation, and was burned about the face and body as a direct proximate result of an explosion caused by defendant's negligent action in pouring oil upon an open fire; that since receiving said injuries he has been unable to perform his usual manual labor, and thereby suffered loss of earnings and has become liable for medical services and supplies in the sum of $1,800; and that he has suffered, and will continue to suffer, mental and physical pain as a result of the permanent and serious nature of his injuries. The defendant has filed an answer wherein it makes certain denials and certain affirmative allegations.

This is an action for negligence against the defendant Shell Oil Company. The said defendant defends upon the ground that it was not negligent, and, by way of an affirmative defense, upon the further ground of contributory negligence on the part of the plaintiff.

In determining this case you should first concern yourself with determining whether the defendant was guilty [159] of the alleged negligence which was the proximate cause of the damages sustained by the plaintiff, and if you do not find that the plaintiff has proved such negligence by a preponderance of the evidence, then you should find for the defendant without considering the matter further.

If you should find, however, that negligence on the part of the defendant was the proximate cause

of the injuries, if any, sustained by the plaintiff, then your verdict should be for the plaintiff, unless you find that the injuries, if any, complained of by the plaintiff were contributed to by negligence on the part of the plaintiff.

Negligence is never presumed and it cannot be inferred or presumed that either the defendant or the plaintiff was negligent from the mere fact that an accident occurred. The burden is upon the plaintiff to establish the material allegations of his complaint by a preponderance of the evidence. The mere charges of negligence in the complaint are not evidence, but the plaintiff has the burden of establishing by a preponderance of the evidence one or more of the charges of negligence alleged in the complaint, and that such negligence, if any, was the proximate cause of the injuries sustained.

The burden is upon the plaintiff in the first instance to establish by a preponderance of the evidence the claim for relief set forth in his complaint.

By a preponderance of the evidence I do not necessarily [160] mean the greater number of witnesses on a material point, but rather the greater weight of the evidence; that is, that evidence which when fairly, fully and impartially considered by you produces the stronger impression and is more convincing as to its truth or correctness when contrasted or weighed against the evidence in opposition thereto.

Likewise, the burden rests upon the defendant to prove by a preponderance of the evidence that the plaintiff was guilty of the contributory negligence which it has charged.

While it is incumbent on the plaintiff to prove his case by a preponderance of the evidence, the law does not require of the plaintiff proof amounting to demonstration or beyond a reasonable doubt. All that is required in order for plaintiff to sustain the burden of proof is to produce such evidence which, when compared with that opposed to it, carries the most weight, so that the greater probability is in favor of the party upon whom the burden rests.

Negligence is the omission to do something which an ordinary prudent person would have done under the same circumstances or doing something which such person would not have done under the same circumstances.

Contributory negligence, which has been asserted as a defense in this case, is defined as an act or omission by the plaintiff amounting to a want of ordinary care for [161] his own safety, which is the proximate cause of his injuries though concurrent with some negligent act of the defendant.

If you believe from the evidence in this case that the plaintiff's injuries, if any, were caused in part by the negligence of the defendant, but that the plaintiff at the time and place of the accident failed to exercise that degree of care that an ordinary reasonably prudent person would exercise under the same or similar circumstances, and that such failure on the part of the plaintiff proximately contributed to cause his injuries, then the plaintiff cannot recover, and you must find for the defendant.

The burden of proving this defense of contributory negligence is on the defendant. You may, how-

ever, consider the evidence adduced on the part of the plaintiff in determining whether or not the plaintiff was contributorily negligent and whether that negligence continued up to the time of, and proximately contributed to, his injuries.

The proximate cause of any injury is a cause which in its natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred. But in order to warrant a finding that the negligence is the proximate cause of the injury it must appear from the evidence that the injury was the natural and probable consequence of the negligence and ought to have been foreseen as likely to occur by a person of ordinary prudence in the light of the attending circumstances. [162]

There must be a direct causal connection between the negligence of the defendant and the injuries to the plaintiff. In this case the negligent acts of the defendant, if any, must be the proximate cause of the plaintiff's injuries, if any, in order that the plaintiff may recover.

By the phrases "reasonable care" or "ordinary care," as used in these instructions, is meant the exercise of that care and caution as would be exercised by a reasonably prudent person under the same or similar circumstances.

"Ordinary" or "reasonable" care are relative terms, and such care is proportionate to, and commensurate with, the danger involved; in other words, the greater the danger involved, the greater is the care required, although there is but one stand-

ard of care, and that is reasonable or ordinary care.

You cannot return a verdict for the plaintiff in this case, if, in order to do so, it is necessary to resort to mere conjecture or speculation. Neither can you find a verdict for the plaintiff merely because an accident occurred, or because the plaintiff was injured. Before finding a verdict for the plaintiff you must believe from a preponderance of the evidence and as a fair inference from the evidence adduced that the defendant was guilty of negligence and that the plaintiff suffered injuries that were the proximate result of such negligence. [163]

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill, or caution, still, no one may be held liable for injuries resulting from it.

A person who invites another to come upon his premises upon a business in which both are concerned is bound to take care that his premises and all appliances provided by the owner as incidental to the use of his premises are safe for that other person to come upon and use them as required, or else to give due warning of any danger to be avoided.

It is the imperative and sworn duty of the jury to hear and determine this case precisely the same as if it were between two individuals. You should

return a verdict according to the facts established by the evidence introduced during the trial and the law as laid down by the Court, without reference to the individual character of the plaintiff or the corporate business or character of the defendant.

You should require as much evidence to find an issue against a corporation as you would against an individual. A corporation is entitled to the same protection of the [164] law as is an individual. Sympathetic feelings have no place whatever in the trial of a case in a court of justice. You should disregard all such influence and determine this case according to the law and the evidence given you in open court regardless of who the parties are, and with fairness and impartiality.

A corporation is an artificial person, a creature of the law. It must necessarily act through its servants, agents and employees. An act of an employee within the scope of his employment, or within the course of his employment, is an act of his employer, and the negligence of the employee in the performance of his duties is the negligence of the employer.

In order for the plaintiff to recover against the defendant Shell Oil Company in this action, he must establish by a preponderance of the evidence either that Rocky Mountain Oil Corporation was an agent of Shell Oil Company at the time of the accident here in issue, or that Rocky Mountain Oil Corporation and Shell Oil Company were engaged in a joint adventure at the said time. In determining the relationship between the Shell Oil Company and the Rocky Mountain Oil Corporation you may take into

consideration all of the provisions and conditions of the writings between them and all other evidence in this case.

"Agency" is the relationship resulting from the manifestation of consent by one to another that the other shall act on his behalf and subject to his control and consent by the other so to act. The relationship of "principal and agent" need not necessarily involve some matter of business, but, where one undertakes to transact some business or manage some affair for another by authority and on account of such other person, the relationship arises, irrespective of existence of a contract or receipt of compensation by either party.

In determining whether or not the relationship of principal and agent existed between the Shell Oil Company and Rocky Mountain Oil Corporation, or whether the Rocky Mountain Oil Corporation was conducting drilling operations as an independent contractor, you must look to the character of the control exercised by the Shell Oil Company. If Shell Oil Company retained the right not only to direct what should be done, but also how it should be done, in all substantial particulars, and reserved, in practical effect, power to subject Rocky Mountain Oil Corporation to its will and direction in the course of the conduct of the drilling referred to, the relationship was that of principal and agent.

A joint adventure is generally a relationship analogous to but not identical with a partnership, and is often defined as an association of two or more persons to carry out a single business enterprise

with the objective of realizing a profit. To constitute a joint adventure the parties may combine their property, money, efforts, skill or knowledge in some common undertaking, and their contribution in this respect need not be equal or of the same character, but there must be some contribution by each joint adventurer of something promotive of the enterprise; and even though one adventurer owns all the property used in the joint adventure, this is not conclusive in determining whether such relationship exists. In a joint adventure there must be agreement to enter into an undertaking between parties having a unity of interest in the objects or purposes of the agreement, and a common purpose in its performance; while a provision for sharing losses is important in construing an agreement for a joint adventure, it is not essential, and neither an agreement to share profits nor losses is conclusive in the construction of the contract, but the intention of the parties controls.

If you find from the evidence in this case that there was such a joint adventure existing between Shell Oil Company and the Rocky Mountain Oil Corporation at the time of the accident, and you further find that there was negligence on the part of the employees of Rocky Mountain Oil Corporation which was the proximate cause of plaintiff's injuries, if any, then you may find the Shell Oil Company liable in damages for the result of the said negligence.

Or, if you find that a principal and agent relationship existed between Shell Oil Company and

Rocky Mountain Oil [167] Corporation at the time of the said accident, and you further find that there was negligence on the part of the employees of Rocky Mountain Oil Corporation which was the proximate cause of plaintiff's injuries, if any, then you may find the Shell Oil Company liable in damages for the result of the said negligence.

On the other hand, however, if you find that the Rocky Mountain Oil Corporation was not an agent of Shell Oil Company at the time of the said accident, and if you also find that Rocky Mountain Oil Corporation and Shell Oil Company were not joint adventurers at the said time, then you must find for the defendant Shell Oil Company, and against the plaintiff.

Certain witnesses have been called here, commonly referred to as expert witnesses, and insofar as the testimony of the expert witnesses is concerned you will consider that and treat it in the same manner as you would treat any other testimony in the case. The fact that it was offered by experts does not compel you to take their testimony in preference to any other, but you should give the testimony of the expert witnesses the same weight, the same consideration, everything else being equal, as that of any other witness. The value of an expert's opinion depends not only upon the qualifications and experience of the witness, but also upon the facts which he takes into consideration and upon which he bases his opinion. [168]

In passing upon the questions of fact in this case,

you will determine the credibility to be given the testimony of each witness and you have a right to take into consideration his interest, if any, in the result of the case, his demeanor on the witness stand, his candor or lack of candor, and all other facts and circumstances which could influence you in determining whether or not a witness has told the truth. You will determine the weight to be given to the testimony of each witness called to the stand.

If you believe from the evidence that any witness has wilfully sworn falsely in his testimony in this trial, regarding any material matter testified to by such witness, then you may totally disregard the testimony of such witness except insofar as he is corroborated, to your satisfaction, by other and credible evidence, or by facts and circumstances proved on the trial.

In determining questions of fact you are not at liberty to follow your own ideas of what the law is or ought to be. You should, on the contrary, look solely to the evidence for the facts and to the instructions given you for the law, and return a verdict according to the facts established by the evidence and the law as given you by the Court.

You should not take any particular statement or any particular portion of the instructions and consider that as being the entire law of the case, and you should not [169] place any undue emphasis on any particular portion of the instructions. You should consider the instructions given you as a whole, and when so considered you should apply them to the facts submitted to you.

You should disregard any statements of counsel for either side, if any were made during the trial or the argument in the case, which are contrary to or not in accord with your recollection of the evidence, and you will also disregard all evidence which may have been offered by either side and not admitted in evidence. It is also your duty to disregard any evidence which may have been ordered stricken from the record.

If, after deliberating on this matter, you determine that the plaintiff is entitled to recover, you should determine the amount to which he is entitled by an open and frank discussion among your members and you should not arrive at any amount to be allowed by each stating the amount you think should be allowed, then adding the several amounts together and dividing the total by twelve or by the number taking part in such method. This would be a quotient verdict and you should not, under your oath as jurors, arrive at any such verdict.

If from the evidence admitted during this trial and under the instructions given you by the Court you find the issues for the plaintiff, then in order to enable you to estimate the amount of such damages as you may allow for pain and suffering, it is not necessary that any of the witnesses should have expressed an opinion as to the amount of such damages, if any. You may estimate such damages from the facts, circumstances and evidence and by considering them in connection with your own knowledge and experience in the affairs of life. With regard to pain and suffering the law pre-

scribes no definite measure of damages, but leaves such damages to be fixed by you as your discretion dictates and as under all the circumstances may be just, reasonable and proper, not exceeding the amount prayed for in the complaint.

If you find that the plaintiff is entitled to recover you may award him such damages, within the amount claimed, as in your opinion will compensate him for the pecuniary damages proved to have been sustained by him and proximately caused him by the wrong complained of. You may consider the physical and mental pain suffered, if any, by the plaintiff. You may also consider such impairment, if you find any, with reference to the plaintiff's physical condition and such pain, if any, as plaintiff will suffer in the future, as a result of this accident. You may also consider the amount or amounts that he necessarily paid out for the expenses that were incurred for medical care. You may further consider the reasonable value of time lost, if any, by plaintiff, wherein he has been unable to pursue his occupation. [171]

The fact that you are instructed as to the measure of damages under the law in this case is not to be taken by you as an indication that the Court believes or does not believe that the plaintiff is entitled to recover. It is the duty of the Court to instruct you upon the entire law of this case and therefore the instructions upon the measure of damages are to guide you in the amount of damages to be awarded in the event, and only in the event, that you find the plaintiff is entitled to recover at all.

The Court has heard it suggested that jurors sometimes scrutinize instructions of the Court with a view of ascertaining therefrom the personal opinion of the Court upon the merits of the case. The Court has no power to charge you upon the facts or either directly or indirectly indicate to you its view upon the merits. It is the duty of the Court to charge you upon the law only, and as jurors sworn to try the cause upon the law and the evidence, you have no right to assume that the Court has any views as to the verdict that should be arrived at as the result of your deliberations in this case, and you must enter your deliberations with the understanding that the Court has no opinion or idea as to what your verdict should be.

You should not consider or in any way or to any extent be influenced or controlled by the remarks or statements of the Court in replying to questions or in replying to statements of counsel on either side, or by any remarks or statements of the Court in ruling upon the admissibility of evidence or to evidence offered but not received or evidence ordered stricken from the record by the Court. Your verdict should be based upon the evidence admitted upon the trial and the instructions of the Court applicable thereto and upon nothing else.

In this Court it is necessary that you all agree in arriving at a verdict. When you retire you will first elect one of your number as foreman and when you have agreed on a verdict your foreman alone will sign the verdict. Forms of verdict have been prepared for your use and you will have no trouble

in using the form which will correctly reflect your findings.

One form contains a blank space for the amount of damages you will allow if you find in favor of the plaintiff and against the defendant. In the other form there is no blank space and this, of course, is the form you will use if you find for the defendant.

When you arrive at a verdict it will be returned into open court.

I will excuse you for a moment while I take up a matter of law with counsel. [173]

Mr. Coughlan: We have no exceptions.

Mr. Marcus: May it be stipulated that the reporter may copy the exceptions and objections that were made to the instructions and the failure to instruct as were made in the Wuthrick vs. Shell Oil case, and in addition we object to the failure of the Court to give our requested instructions one through nine.

The Court: Very well.

EXCEPTIONS AND OBJECTIONS TO INSTRUCTIONS

Mr. Marcus: We except and object to the instructions and to the failure to instruct as follows: The failure of the Court to direct a verdict for the defendant. The failure of the Court to interpret the written contracts that have been introduced here between the Shell Oil Company and the Rocky Mountain Oil Corporation, and to instruct the jury

as to the effect of those contracts and the relationship created, as well as failure to interpret the other written instruments submitted in the case, and instruct as to their legal effect. We also object and except, your Honor, to the instruction of the Court leaving the interpretations of the contracts up to the jury. We think that is a law question that the jury should be instructed on by the Court. We also except and object to the instruction to the jury that they may consider the contracts in determining the relationship and all other evidence in the case with respect to control of the Shell Oil Company upon the ground that there was no evidence showing any control over and beyond the contract terms at the particular time of this occurrence. We except, your Honor, to the instructions on joint adventure and principal and agent, leaving those questions up to the jury for determination and we except and object to the instructions given with respect to the definition of joint venture and principal and agent for the reason that they are incomplete, that they are not accurate statements of the law of this state and applicable to this case. We also object and except to the definition of agency contained in the instructions of the Court. We especially object to the definition of venture as given by the Court in failure to point out to the jury all of the essential elements of such joint venture, and failing to instruct the jury as to the extent of control necessary in a joint venture and the extent of ownership, the sharing of profits and losses. We especially object to the principal and agent instruction for the reason

that it does not define the extent of control that must be found before liability is imposed on an agent, especially in failing to specify that there must be control over the manner and means of the performance of the work or activity that is subject to the instruction. We also object and except to the instruction with respect to the duty of owner of premises to invitees upon the ground that the evidence shows that Shell Oil Company had no ownership or title in the premises where the accident occurred. That is all. [175]

The Court: The exceptions will be noted. You may call the jury.

(Jury duly called and bailiffs sworn.)

The Court: You may now retire to consider your verdict. [176]

State of Idaho,
County of Ada—ss.

I, Dwight K. Wells, hereby certify that I am an official Court Reporter for the United States District Court for the District of Idaho, and

I further certify that I am the person who took the proceedings had in the above-entitled hearing in shorthand and thereafter transcribed the same into typing and

I further certify that the foregoing transcript is a true and correct transcript of said matter.

In witness whereof I have hereunto set my hand this 1st day of November, 1956.

/s/ DWIGHT K. WELLS,
Court Reporter.

[Endorsed]: Filed November 9, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP) to wit:

1. Complaint.
2. Motion for Designation of Sheriff to Serve Summons, etc.
3. Order for Service by Sheriff.
4. Summons with return thereon.
5. Affidavit of Service.
6. Motion of Stony Point Development to Dismiss.
7. Motion of Shell Oil Co. for More Definite Statement.
8. Stipulation for hearing Motion for More Definite Statement.

9. Minutes of the Court of March 15, 1956.

10. Answer of Shell Oil Company.

11. Affidavit and Notice of Withdrawal of Attorney G. Staudacher for Rocky Mountain Oil Corporation.

12. Affidavit and Notice of Withdrawal of Attorney G. Staudacher for Stony Point Development Co.

13. Notice to Appiont Attorney or Appear in Person—Rocky Mountain Oil Corporation.

14. Notice to Appoint Attorney or Appear in Person—Stony Point Development Co.

15. Affidavit of Mailing of Notices.

16. Copy of Letter, Glenn A. Coughlan to Claude Marcus dated June 1, 1955.

17. Answer to Rocky Mountain Oil Corporation.

18. Stipulation and Order of Dismissal of Stony Point Development, Inc.

19. Request for Admissions (Plaintiff's Exhibit 8—with exhibits).

20. Interrogatories by Plaintiff.

21. Answer to Interrogatories by Rocky Mountain Oil Corp.

22. Minutes of the Court of October 5, 1955.

23. Requested Instructions by Shell Oil Company.

24. Verdict.

25. Minutes of the Court of October 6, 1955.

26. Judgment.

27. Reporter's Transcript.

28. Notice of Time and Place of Taxation of Costs.

29. Memorandum of Costs against Shell Oil Co.

30. Affidavit of Mailing of Cost Bill against Rocky Mountain Oil Co.

31. Notice of Time and Place of Taxation of Costs.

32. Memorandum of Costs against Rocky Mountain Oil Co.

33. Motion of Shell Oil Co. for Judgment in Accordance with Motion for Directed Verdict, or for New Trial.

34. Order Granting Motion of Shell Oil Co. for Judgment in Accordance with Motion for Directed Verdict.

35. Judgment Vacating Judgment against Shell Oil Co.

36. Memorandum of Costs of Shell Oil Co.

37. Notice of Time and Place of Taxation of Costs.

38. Motion for New Trial.

39. Affidavit of Clarence S. Robinson.

40. Affidavit of Edmund W. Windolph.

41. Affidavit of Glenn A. Coughlan.

42. Supplemental Motion for New Trial.

43. Minutes of the Court of April 6, 1956.

44. Motion for Extension of Time and Permission to File Counter Affidavits, with Attached Affidavits.

45. Objection to Motion for Extension of Time in Permission to File Counter Affidavits.

46. Affidavit in Opposition to Motion for Extension of Time and Permission to File Counter Affidavits.

47. Motion to Strike from the Files.

48. Order Granting New Trial.

49. Notice to Take Deposition of Dr. R. B. Lindsay.

50. Motion for Summary Judgment.

51. Motion to Postpone Trial of Case (Affidavit of Claude Marcus attached).

52. Supplemental Order Granting Motion for New Trial as to Shell Oil Company.

53. Minutes of the Court of May 21, 1956.

54. Motion in Opposition to Defendant's Motion for Summary Judgment.

55. Notice of Filing of Deposition of Dr. Rulon B. Lindsay.

56. Defendant's Requested Instructions.

57. Minutes of the Court of May 24, 1956.

58. Verdict.

59. Minutes of the Court of May 25, 1956.

60. Judgment for Plaintiff.

61. Motion of Shell Oil Co. for Judgment in Accordance with Motion for Directed Verdict, or for New Trial.

62. Memorandum of Costs of Plaintiff.

63. Notice of Time and Place of Taxation of Costs.

64. Minutes of the Court of July 26, 1956—Denying Motion for New Trial.

65. Notice of Appeal.

66. Undertaking on Appeal.

67. Designation of Contents of Record on Appeal.

68. Statement of Points upon which Appellant Intends to Rely on Appeal.

69. Motion for Order Extending Time to File Record and Docket Cause.

70. Order Extending Time to File Record and Docket Cause.

71. Exhibits Nos. 7, 9, 10, 11 and 12 admitted during first Trial on October 5, 1955, and not offered at second Trial.

72. Exhibits Nos. 1 to 15 inclusive, admitted at second trial.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 9th day of November, 1956.

[Seal] ED. M. BRYAN,
Clerk,

By /s/ LONA MANSER,
Deputy.

[Endorsed]: No. 15365. United States Court of Appeals for the Ninth Circuit. Shell Oil Company, a Corporation, Appellant, vs. Lanus Wayne Prestidge, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed November 12, 1956.

Docketed: November 23, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15365

SHELL OIL COMPANY, a Corporation,

Appellant,

vs.

LANUS WAYNE PRESTIDGE,

Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant herewith submits a statement of the points upon which it intends to rely on appeal.

(1) The error of the trial court in refusing to grant the motion to dismiss made by appellant prior to the trial and in refusing to grant the motion for directed verdict made by appellant at the close of evidence in the first trial of this cause and refusal to grant the motion for directed verdict made by this appellant at the close of the evidence at the second trial.

(2) The error of the trial court in refusing to grant the motion for directed verdict of this appellant.

(3) Error of the court in granting the motion of plaintiff for new trial based on newly discovered evidence after the trial court had granted the mo-

[Title of Court of Appeals and Cause.]

STIPULATION THAT EXHIBITS NEED NOT BE PRINTED

It is stipulated and agreed between the parties hereto that none of the exhibits in this case need be printed in the record, but that said exhibits may be considered and referred to by the court and counsel as though contained in the printed record on appeal.

Dated November 20, 1956.

/s/ CLAUDE MARCUS,

/s/ BLAINE F. EVANS,

/s/ GRANT C. AADNESEN (C.M.)
Attorneys for Appellants.

/s/ GLENN A. COUGHLAN,
Attorney for Appellee.

[Endorsed]: Filed November 23, 1956.